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HARVARD







REPORTS OF CASES

ARGUED AND DETERMINED IN THE VARIOUS

COURTS OF APPEAL

OF THE

STATE OF LOUISIANA.

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REPORTED BY

HON. FRANK MCGLOIN,

One of the Judges of the Court of Appeals for the parish of Orleans.

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4°

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F. F. HANSELL, PUBLISHER, 30 CAMP STREET.

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## PREFACE AND DEDICATION.

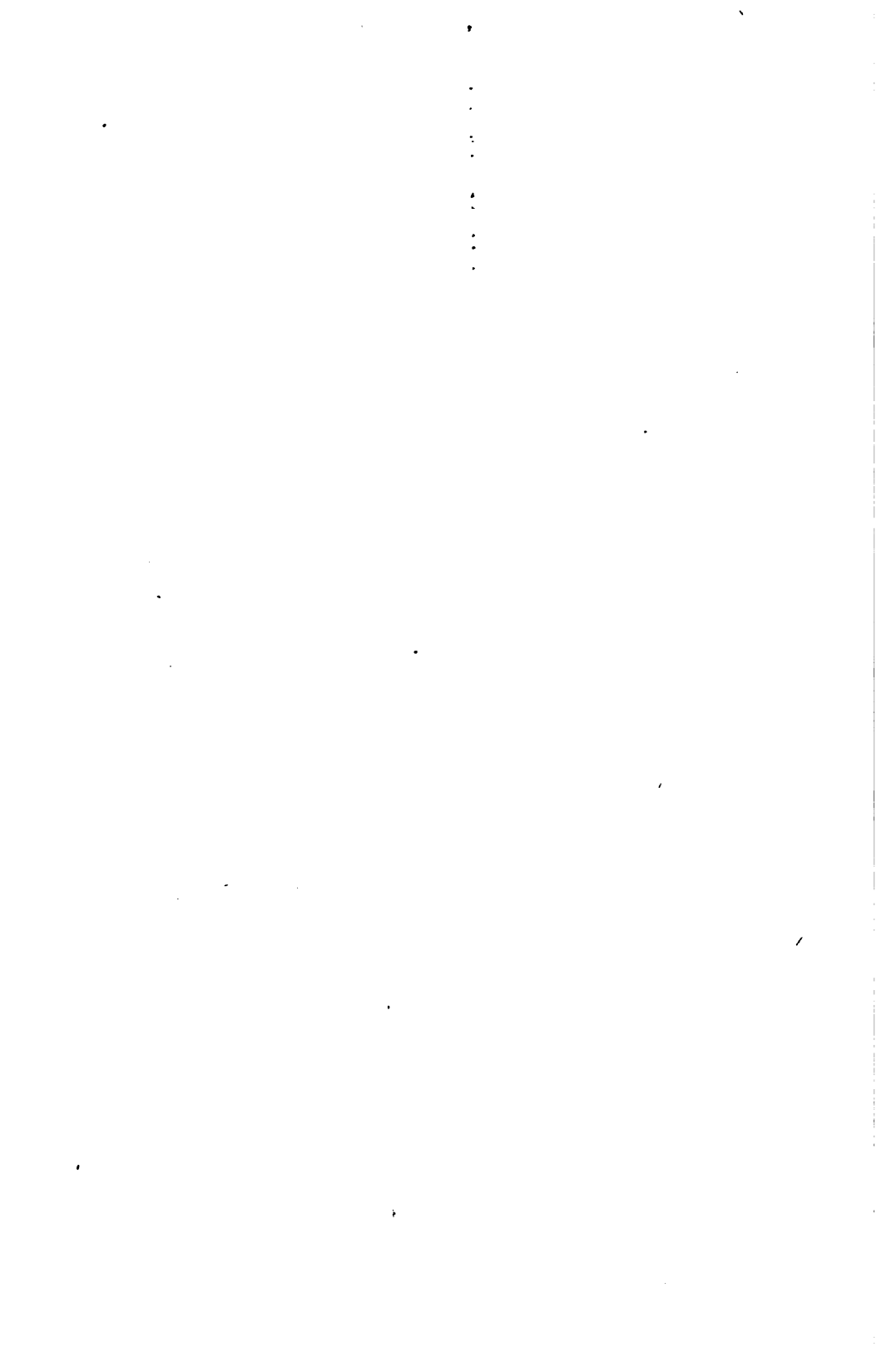
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THE object of these Reports is to preserve for the use of the profession such of the opinions of the various Courts of Appeal of this State as may be of interest. The syllabi of the various cases reported have, usually, been kindly prepared by the judges who rendered the decrees therein.

The judges presiding over the various Circuits, in the rural portion of the State, have promised to prepare for publication such of their own opinions as they consider useful or interesting. None were so forwarded in time for publication in the first number of this Report; but we trust that the case will be different with those succeeding.

This volume has been prepared and published with the hope that it may, to some extent, minister to the convenience of the BENCH and BAR of the State, and it is respectfully dedicated to those in whose service it has been undertaken.

*New Orleans, March 31st, 1881.*



# JUDGES OF THE COURTS OF APPEAL

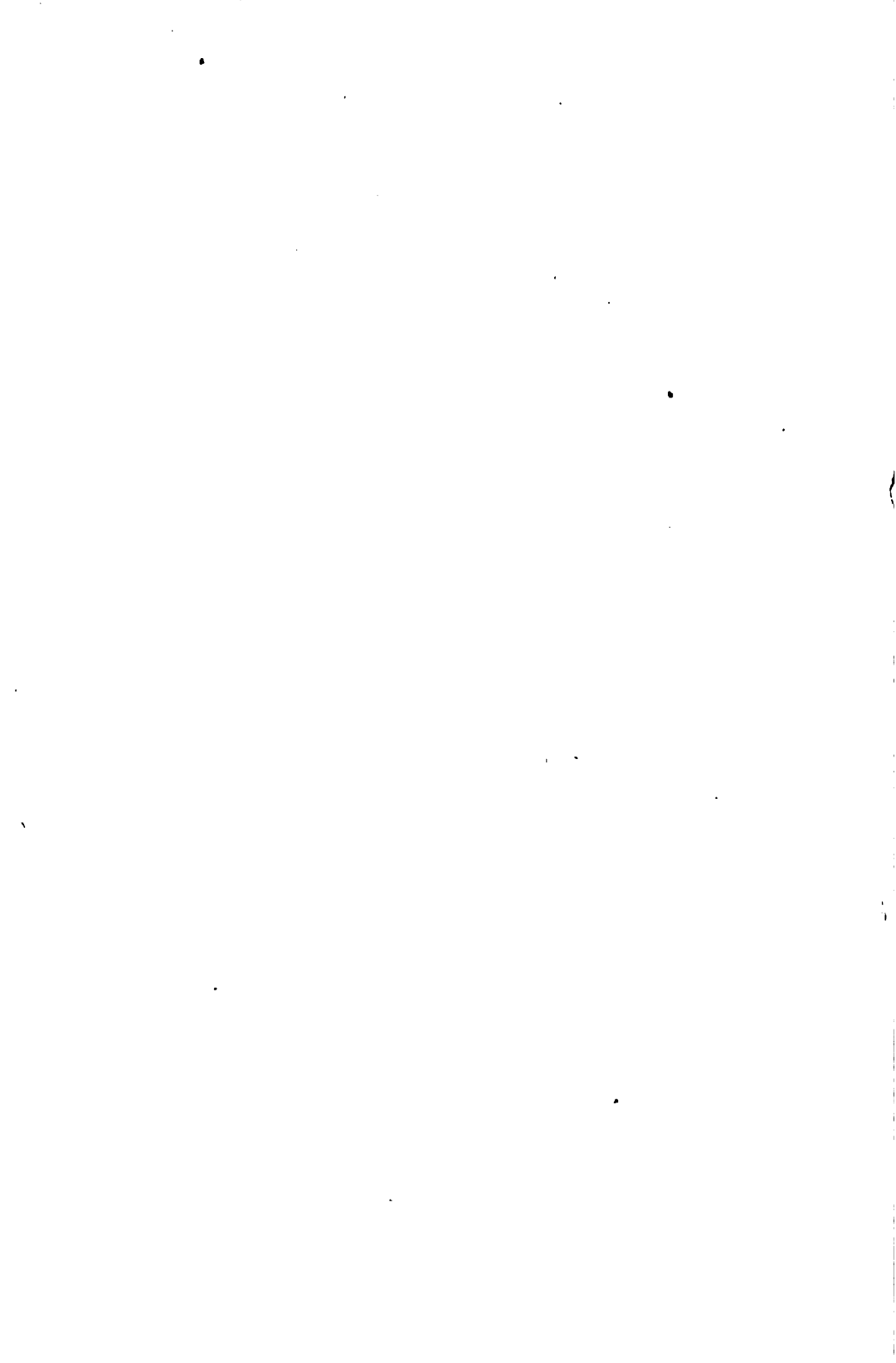
OF THE

## STATE OF LOUISIANA.

ELECTED BY THE GENERAL ASSEMBLY OF THE STATE ON THE 22D DAY  
OF JANUARY, 1880, UNDER ARTICLE 96 OF THE CONSTITUTION.

NAMES.	TERM OF OFFICE.	COMPOSITION OF THE CIRCUITS.
JOHN CONWAY MONCURE.....	8 years.	{ Caddo, Bossier, Webster, Blen- ville, Claiborne, Union, Lin- coln, Jackson, Caldwell, Winn, Natchitoches, Sabine, DeSoto and Red River.
ALEXANDER BANKS GEORGE...	4 years.	
OWEN MAYO.....	8 years.	{ Ouachita, Richland, Franklin, Catahoula, Concordia, Tensas, Madison, East Carroll, West Carroll and Morehouse.
WILLIAM WOOD FARMER.....	4 years.	
JOSEPH MURTOUGH MOORE....	8 years.	{ St. Landry, Avoyelles, Rap- ides, Grant, Vernon, Calcasieu, Cameron, Vermillion, Lafa- yette, Iberia and St. Martin.
ALFRED BRIGGS IRION .....	4 years.	
CHARLES McVEA .....	8 years.	{ East Baton Rouge, West Baton Rouge, Livingston, Tangipa- hoa, St. Tammany, Washing- ton, St. Helena, East Felic- iana, West Feliciana, Pointe Coupee and Iberville.
SAMUEL JAMES POWELL.....	4 years.	
EUGENE WILLIAM BLAKE*....	8 years.	{ St. Mary, Terrebonne, As- sumption, Lafourche, St. Charles, Jefferson, St. Ber- nard, Plaquemines, St. John the Baptist, St. James and Ascension.
ADRIEN CHARLES DUMARTRAIT	4 years.	
WALTER HENRY ROGERS.....	8 years.	{ Orleans.
FRANK MCGLOIN.....	4 years.	

\*Appointed by the Governor on the 25th day of June, 1880, to fill the vacancy occasioned by the death of Joseph Richard Winchester, deceased, who had been elected Judge.



**RULES**  
**OF THE**  
**COURT OF APPEALS**  
**FOR THE**  
**PARISH OF ORLEANS.**

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**RULE I.**

**TERM.**

Until otherwise provided, the Court of Appeals for the parish of Orleans shall hold its sessions during the time fixed by law, as follows, viz :

1. Court will be held for the trial of causes on all legal days of its session, except from Christmas to the second day of January, on every day of each alternate week, commencing on the second Monday of November, 1880.

2. The regular hour for opening Court shall be 11 o'clock A. M., and for adjournment 3 o'clock P. M., unless the business of the day has been earlier disposed of.

**RULE II.**

**RETURN DAY FOR APPEALS.**

All appeals shall be made returnable on the second and fourth Monday of each month during term.

**RULE III.**

**APPEALS ON QUESTIONS OF LAW.**

Every case transmitted, on particular questions of law, for the consideration of the Court, must, by bill or bills of exception, certified by the judge *a quo*, state the question or questions of law reserved, and such facts only as raise the question or questions submitted ; such bills are not to be lengthy narratives of fact.

(1). The Court will not go into any matter of evidence which occurred at the trial, if not stated in the bill or bills of exception.

(2). The Court will not consider an objection which has not been reserved.

(3). Appellant has a right, in all cases of appeal, to assign errors of law apparent on the face of the record, except want of evidence to support the judgment; nothing which may have been cured by legal evidence in the court below can be assigned as error. He may, also, bring up for review, by a statement of facts prepared in accordance with Arts. 602 and 603 C. P., the general application of the law made by the lower court, to the facts of the case.

#### RULE IV.

##### DOCKETING CAUSES.

1. Cases will be docketed in the order of their filing.

2. The clerk shall keep a summary docket, but will enter causes therein only on the formal written application of counsel, stating the facts entitling such cause to a summary trial.

3. Cases of the character entitled under existing laws to a summary trial in the Supreme Court shall be here entitled to summary trial; and whenever it shall be made to appear to the Court that a case has been improperly placed on the summary docket, by order of counsel, the same shall, thereupon, be transferred to the ordinary docket, and entered at the foot thereof.

#### RULE V.

##### FILING RECORDS.

In filing records in causes appealed, the following requirements must be observed :

1. Counsel for appellant must file with the record a certificate of the Clerk of Court or counsel that the record filed is the original record, and includes all the pleadings, evidence and documents in such cause and minute entries therein, except where originals of such entries are in the record. The record must also be accompanied with a detailed list of all such pleadings, evidence and documents, and in the order of their filing, certified by the Clerk or counsel.



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**RULE VI.**

**WITHDRAWAL OF RECORDS.**

1. Only counsel engaged in a cause will be allowed to withdraw the record of the same from the Clerk's office, and then not until the expiration of three days, during which motions to dismiss may be made.

2. No record shall be withdrawn from the Clerk's office of this Court for more than seven days, except by special permission of the Court, and all records withdrawn must be returned to the Clerk at least forty-eight hours previous to the day on which the case is fixed for trial.

3. Records shall, in all cases, be receipted for on withdrawal, and must be returned on requisition of the Clerk.

4. Upon the decree in any case becoming final, the original record filed in this Court shall be returned, with a certified copy of the opinion and decree, to the District Court, and receipt therefor taken on the Docket of this Court.

**RULE VII.**

**FIXING CASES.**

On Monday of each alternate Court week causes will be called and fixed for trial for the second week thereafter. Those cases fixed shall be posted by the Clerk by 11 o'clock of the day following, which shall be notice to all parties. This rule shall not prevent the Court from assigning cases for trial for particular days, without calling, in which event such cases shall be immediately posted and counsel notified by the Clerk.

**RULE VIII.**

**BRIEFS.**

1. Before 11 o'clock on the day prior to the day fixed for trial, the appellant shall file with the Clerk three copies of his brief (written or printed), containing a clear statement of the points of fact and law upon which he relies, and the authorities supporting the same. Citations or precedents shall be in full, with title of cases, as well as the volumes and pages of the reports.

2. The appellee, if he desires, shall be entitled to five days to reply to any brief of appellant.

3. The appellant shall not be entitled to orally argue his cause unless he has complied with section one of this rule; but may submit the same on written or printed briefs, to be filed within five days.

4. Three copies of all briefs must be filed: two for the use of the Court, and one for the use of the opposite counsel.

5. No brief shall be received by the clerk in any cause after the same has been submitted, unless the same is accompanied by a written certificate of counsel that he has delivered a copy to the opposite counsel, or by the written acknowledgment or waiver of such delivery, signed by opposite counsel.

#### RULE IX.

##### ARGUMENT.

1. The original plaintiff in the lower court shall have the right of opening and closing the argument in this Court.

2. Not more than one hour will be allowed to the counsel on each side, except with the special permission of Court, granted before the argument is begun.

#### RULE X.

##### SUBMISSION OF CASES.

By permission of the Court, causes pending before the Court may be submitted on briefs, upon the written consent of both parties.

#### RULE XI.

##### MOTIONS TO DISMISS.

All motions to dismiss appeals must be made in writing. They must be accompanied by a concise written or printed brief, which has been served upon the opposite counsel, as provided by Section 5 of Rule VIII. The opposite counsel shall be entitled to five days to answer such a motion to dismiss, by written or printed brief, at the expiration of which delay such motion to dismiss shall be taken under advisement by the Court.

**RULE XII.**

**REHEARINGS.**

1. Applications for rehearing must be by petition filed within six judicial days after the rendition of the decree, and must be accompanied by a printed or written statement of all the points and authorities on which the party founds his application.

2. When a rehearing is granted, the cause will be immediately called and fixed with preference, and briefs will be required, as in Rule VIII, except when the error involved is inconsiderable, or simply relates to the imposition or distribution of the costs of suit.

3. Only one rehearing in a cause will be granted.

**RULE XIII.**

**INSTRUCTIONS.**

1. No motion will be entertained unless it be in writing, upon not less than a half sheet of paper, and with the proper endorsement upon it.

2. All instructions to the Clerk, and agreements of counsel on which the Court is to act, must be in writing, and duly filed.

**RULE XIV.**

**WRITS OF MANDAMUS, ETC.**

1. No application for writs of mandamus, prohibition, *certiorari*, and the like, will be entertained by the Court unless previously properly docketed and filed in the Clerk's office.

2. The Court will entertain no application for a writ of prohibition, unless previous notice shall have been given to the opposite party or his counsel, the services of such notice to appear by certificate of counsel.

3. All writs of mandamus, prohibition, and the like, shall be fixed and submitted on printed or written briefs, and without oral argument.

**RULE XV.**

**MAKING PARTIES.**

1. Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases.

2. When the appellant dies, pending this appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may, on affidavit, apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined, as in other cases.

3. If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appeal will be dismissed. The appellee must cause the said order to be published three times in a newspaper printed in the City of New Orleans; and upon proof of such publication, and in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined, as in other cases.

4. If the appellee dies pending the appeal, and his proper representatives be known, and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of the service, the appellant may proceed to have the cause heard and determined, as in other cases.

5. If the appellee's proper representatives be not known, or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper printed in the City of New Orleans; and upon proof of such publication, and in default of appearance, the appellant may proceed to have the cause heard and determined, as in other cases.

6. The foregoing provision will apply to corporations, the charters of which may become extinct pending the appeal, by limitation of time, forfeiture, or other mode of dissolution.

CASES  
ARGUED AND DETERMINED  
IN THE  
COURTS OF APPEAL  
OF THE  
STATE OF LOUISIANA.

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No. 4.

STATE *ex rel.* LAMARQUE *v.* CITY OF NEW ORLEANS *et al.*

Pending a suspensive appeal, the rights of an appellant thus secured cannot be impaired or destroyed by subsequent proceedings in the lower court, which would, from their nature, determine the rights of parties in advance of the decision of the Appellate Court.  
This Court will interfere and prohibit such proceedings.

*Application for Writ of Prohibition.*

*S. Belden*, for relator.

ROGERS, J.—On the 10th April, 1878, relator applied to the Judge of the Sixth District Court, parish of Orleans for, and obtained, a writ of injunction prohibiting the authorities of the city of New Orleans from interfering in any manner with him in carrying on his private market at No. 282 Decatur street, in this city. On the 29th of November, 1879, judgment was rendered dismissing the suit of relator, and he obtained a suspensive appeal to the Supreme Court. Under the Constitution of 1879 the cause was transferred to this Court and is still pending on appeal. Under this condition of affairs, the city of New Orleans in June, 1880, obtained a writ of injunction prohibiting relator from carrying on his private market on Decatur street, between Ursulines and Hospital streets.

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Berkery vs. Carroll.

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There is no dispute as to the identity of the private market kept by relator, referred to by him in his suit, and the one referred to by the city in the subsequent suit.

The question pending on appeal is whether the relator has a right to carry on his private market on Decatur street, in this city. When that question is answered, necessarily the several writs of injunction must abide the result. The jurisdiction of this Court would be easily destroyed if we should grant the premises taken by the city authorities.

The writ of prohibition herein issued is made perpetual, with costs.

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No. 23.

JOHN BERKERY v. WILLIAM CARROLL.

1. A judgment cannot be enjoined upon grounds which were available as a defence in the original cause.
2. The action to annul a judgment, for fraudulent practices in its obtaining must be brought within one year from the date of the discovery of the fraud. O. P. 613.

*Appeal from the late Fifth District Court, for the Parish of Orleans. Cullom, Judge.*

*J. Tharp* for plaintiff, appellant.

*McPhelin & Healy* for defendant, appellee.

The opinion of the Court was delivered by MAX. DINKELSPIEL, Esq., member of the bar, acting in the place of JUDGE MCGLOIN, recused, having been of counsel in the case.

The record presents the following facts: Plaintiff, on the 6th of June, 1873, filed his suit in the late Fifth District Court for the parish of Orleans, alleging that the defendant was indebted unto him in the sum of five hundred dollars by virtue of his being the owner and holder of a promissory note of the defendant for that sum. The note in question was filed with

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Berkery vs. Carroll.

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and made part of the petition; citation in due form of law issued, and the defendant, on the 10th of June, was served in person. On the 23d day of June, judgment by default was had, which was confirmed on the 26th of same month; thereupon, and for the first time in this proceeding, defendant appeared and files a motion for a new trial; alleging, first, that the judgment was contrary to the law and the evidence; second, that the suit in question was based on an obligation which was null, void and of no effect, because not stamped in accordance with law; and third, that the signature of the note was not proven. This motion for a new trial was argued and disposed of, the same having been overruled, and the judgment herein made final on the 3d day of July, 1873, execution issued, and on the 5th day of September, 1874, the defendant filed his petition for an injunction to stay the *fi. fa.*, which was granted. This case is the one now before us; but to properly understand it, it was necessary to state the nature of the judgment enjoined. It is clear that throughout this entire proceeding, defendant in the original suit, and the plaintiff herein, has mistaken his remedy; that every allegation for his petition for the "injunction" should have been plead (if at all) to the merits of the original suit. The fraud charged to Berkery in the procurement and disposition of the note, the alleged fact of its being without consideration, were all matters of defence, and should have been urged in that suit, and did not warrant the injunction proceedings. The only other issue raised was the one of fraud in plaintiff being lulled to sleep by the defendant informing him that the suit itself was an error of his attorney, and that the defendant need pay no heed to it. If this be true, then the petition was fatally defective in form, and no testimony was offered under it to prove that this statement, so material, was made within the time prescribed by law, and the exception of the prescription of one year interposed was well taken. Art. 613 of our Code of Practice is positive on this subject and leaves no room for doubt. It reads: "When a judgment has been obtained through fraud on the part of the

plaintiff, or because the defendant had lost or mislaid the receipt given to him by the plaintiff, the action for annulling such judgment must be brought within the year after the fraud has been discovered, or the receipt found." See also in this connection the case of *Stafford vs. Smith*, 6 L. 91; *Farrar and Wife vs. Silvan Peyroux*, 7 R. 92, and *Wheat vs. The Union Bank of Louisiana*, 7 R. 94. The article of the C. P. 607, and the authorities found in appellant's brief have no application to the case at bar. The writ of injunction in this case was abused by the defendant, Carroll, but there being no prayer for damages, none are given.

Judgment affirmed.

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No. 26.

M. BOURDETTE v. BOARD OF SCHOOL DIRECTORS.

1. Damages resulting from a failure to observe the conditions of a contract of lease, requiring the lessee to keep and return in good order the leased premises, are due from the date of demand by lessor.
2. The right to sue for and recover such damages arises *ex contractu*, and the prescription applicable to an action arising *ex delicto*, does not apply.

*Appeal from the Superior District Court.*

*Chas. F. Claiborne* for plaintiff.

*Alfred Shaw* for defendant.

ROGERS, J.—Plaintiff alleges that by act before A. Mazureau, notary, on the 7th November, 1868, she leased certain property to the Board of School Directors, defendant, for a term of years; that possession was held by defendant until March, 1873. The premises were in perfect order and repair at the date of said lease; and the lessees had by the terms of the contract of lease bound themselves to keep during the lease, and to return at the expiration thereof, the premises in the same good order and condition; that the defendant Board failed to so keep and return the premises, and plaintiff thereby sus-



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Gauthreaux vs. Girardey, Auctioneer, et al.

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tained damages to the extent of nine hundred and six dollars, for which she prays judgment, with legal interest from judicial demand. To this defendant filed four exceptions, only one, that of prescription, appears to have been passed upon in the District Court, and upon which judgment was rendered dismissing plaintiff's suit. This is now before us on appeal. The exception reads : " That if ever valid, the claim is prescribed." While we do not propose to direct counsel as to the manner and form of their pleadings, it is probably incumbent upon us to suggest that we are without authority or disposition to supply that which would either amplify or explain a plea. A claim may be prescribed by the lapse of one, three, ten or thirty years, and to simply urge, by way of *exception* "*that a claim is prescribed*" in the face of a jurisprudence settling that such a plea must be special and express, is submitting rather generously to the judicial temper.

For the purposes of this trial, the allegations of the petition must be taken as true. On their face, whatever they may result in after trial on the merits, they have arisen *ex contractu*. The right of action, as far as we can discover from the petition, arose in March, 1873, suit was filed in October, 1875, and service almost immediately made. Under such a statement of facts, we are at a loss to comprehend the exception that the claim is prescribed.

Judgment reversed and case remanded.

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No. 50.

J. R. ALCEE GAUTHREAUX *v.* C. E. GIRARDEY, Auctioneer,  
*et al.*

1. Laws are not to be interpreted so as to enlarge or restrain the intent of parties, or restrict their right of contracting and of governing their own affairs, unless there be an express prohibition or a provision which parties have no right to modify. C. C. arts. 11, 1963.
2. Courts should not readily construe legislation, as prohibitory.

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Gauthreaux vs. Girardey, Auctioneer, et al.

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3. Public offices are not established for the benefit of those who fill them, but in the interest of the people to perform services of public necessity. Therefore, legislation imposing duties and allowing fees therefor upon sheriffs is not to be considered as having for its object the pecuniary profit of such officers.
4. Section 3548 Revised Statutes, directing certain public sales throughout the State to be made by the sheriffs of the various parishes, is not prohibitory, and does not limit the right of parties to regulate such sales by agreement.
5. Section 3549 Revised Statutes is not an enumeration of exceptions to the operation of section 3548, but extends to persons acting in representative capacities the right of regulating such matters by agreement.
6. The validity of the order of a competent court regulating the manner of selling the property for a partition cannot be collaterally questioned.

*Appeal from the late Sixth District Court. Rightor, Judge.*

*Breaux, Fenner & Hall* for plaintiff, appellant.

*E. Howard McCaleb, and P. P. Carroll* for defendants, appellees.

MCGLOIN, J.—This is an application for an injunction restraining defendant, C. E. Girardey, auctioneer, from selling certain real property at public sale. The petition and the advertisement of said sale annexed to said petition show that the contemplated sale was *with the consent of all parties directly interested*, and that it was being made *in pursuance of an order of a competent Court*. Plaintiff, as civil sheriff of this parish, basis his application upon sections 3548 and 3549 of the Revised Statutes. By the former, judicial sales made in pursuance of any order, judgment or decree of any court of this State, other than justices of the peace, are directed to be made by the sheriff of the parish in which is located the property to be sold, except in cases to be mentioned. The other section permits the property of successions, insolvencies, minors, or persons interdicted, to be sold by such sheriff, or an auctioneer, or the legal representatives of such successions, insolvencies, minors, or persons interdicted.

The contention of plaintiff is that this is prohibitory legis-

lation, rendering null and void all that is done in contravention thereto.

Civil Code, 1963, declares that no law shall operate to enlarge *or restrain* the intent of parties, unless it be some prohibition or other provision which the parties had no right to modify. To the same effect is C. C. Art. 11. Indeed, it would need no express law to formulate this principle, for it is implied from the nature of the institutions of a free country, where the citizen is at liberty to act as he chooses, provided only that he does no legal wrong to the community, or to any individual thereof.

Still more sacred, under the same restrictions, is his right to pass in judgment for himself upon his own interests, and to take such measures as he deems best calculated to promote them. Having these principles in view, prohibitions can be justified only by public necessity; and the courts should not readily construe legislation as being prohibitory. The fact that legislative bodies do usually, although not necessarily, make clear the prohibitory intent, where it exists, by expressly pronouncing nullity against contravening actions is a recognition of these principles.

We can see no possible motive of public policy which could have influenced the Legislature, in this instance, to *restrict* the liberty of litigants in this particular, and deprive them of the right of determining for themselves what manner of sale was best calculated to promote their own interests. That it has either done, or intended so to do, we do not believe. There are many other things which sheriffs are required to do by our law, such as to serve process, seize, keep, advertize and sell, with certain formalities, property under various writs, in respect to all of which his services may, by consent of all parties interested, be dispensed with, or his proceedings modified. We see no reason for the adoption of a different rule in this matter.

That the law, in this instance, as intimated in the petition, intended this legislation in the interest of sheriffs, that they might receive, as a matter of absolute right, the fees and emolu-

ments resulting from such sales, cannot for a moment be supposed. Such offices are established, not with a view to the creation of a revenue for the persons filling them, but in the interest of the public and to perform services deemed necessary for the people. We cannot, therefore, lightly imagine that it was contemplated to make the personal profit of the sheriff the object of legislation; especially where, to accomplish this, liberty of action or individual interests have to be restricted or impaired. Indeed, if this legislation gave to the sheriff an indefeasible right to perform this specific duty, by reason of his emoluments, then, as fees are usually accorded him for all such services as the law requires of him, he would find himself almost entirely emancipated from the control of parties interested, or even of the courts themselves.

The only consideration of any force which can be urged against the views herein expressed, arises from the fact that section 3549, following section 3548, makes exceptions to it, specifying particular cases in which others, besides the sheriffs of the State, may make judicial sales.

The argument may be advanced that the exception proves the rule, and that the courts cannot add to the number of these exceptions. An examination of this section shows that it applies only to the disposal of the property of successions, insolvencies, minors and persons interdicted, whose representatives are incapable of consenting to any waiver of legal formalities, without legislative authorization or judicial permission, itself warranted by legislative sanction. Therefore, this section merely extends to estates and persons incapacitated the same advantages which persons capable of contracting and acting in their own right may secure by stipulation.

There is another consideration which is not without weight. The court granting this order of sale was of competent jurisdiction. Over the question as to how, and by whom it should be made, that court had authority to pass, and its decree can no more be collaterally questioned upon this point than upon others.

**Judgment affirmed.**

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Carroll vs. Wallace.

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No. 91.

D. R. CARROLL *v.* DAVID WALLACE—G. W. SENTELL, Garnishee.

1. Where upon trial of a rule to take interrogatories *pro confessoris*, evidence is tendered and received, without objection, touching all the issues presented by the answer of the garnishee, the proceeding will be considered as a traverse, involving the merits of the controversy.
2. Where a rule to take interrogatories *pro confessoris* is dismissed, the decree is interlocutory, not appealable.
3. *Aliter*, where the judgment of the court is either for or against the garnishee, after trial upon traverse, involving the merits of the issues presented by the garnishee.
4. As a general rule, a cause appealable in favor of one of the parties thereto is appealable in favor of his adversary.

*Appeal from the Third District Court. Monroe, J.*

*F. R. King* for appellant.

*A. Goldthwaite* and *Hudson & Fearn* for appellee.

## ON MOTION TO DISMISS.

MCGLOIN, J.—Plaintiff instituted his suit by attachment against defendant, and made G. W. Sentell garnishee, propounding the usual interrogatories. These were answered, and plaintiff moved to have them taken *pro confessoris*, declaring that he was entitled to such a judgment upon the face of the answers. The parties seem to have drifted, upon the trial, into a general contest involving the truth of the statements set up in said answers. There was judgment dismissing the rule, and plaintiff has appealed.

As the rule was presented, it did not, as to plaintiff, involve the whole of the matters in controversy. The court was asked to condemn garnishee upon the face of the papers; and his rule being dismissed by reason of the sufficiency of the answers, he might by the timely filing of a traverse, put at issue, regularly, the verity of the facts declared, and the judgment upon such a traverse would have been a final disposition of the controversy between plaintiff and the garnishee, and an

appeal therefrom would have brought up for review the order upon the first rule as well as all other interlocutory decrees touching upon the rights of the garnishee. Under such an aspect, the judgment in question would not be final but interlocutory; nor would it work any irreparable injury. Such seems to have been the features presented in *Kratler v. U. S. Bank*, 11 R. 160, and we believe that cause was justly determined.

But it is competent for litigants to go beyond the issues presented in the pleadings and change the character of the demand, provided it be done with the assent of all parties, expressed or implied. This assent is implied by the reception of evidence, without objection, going beyond or varying the pleadings. In this instance such a change seems to have been made, and the rule was treated in all respects as a traverse. Under such circumstances the judgment was conclusive, leaving plaintiff no other remedy or proceeding in the lower court.

Appellees cite *State ex rel. v. Judge*, 23 La. An. 213, in which it is dogmatically propounded that a garnishee, condemned upon trial of a traverse to satisfy the writ, in face of the declarations of his answer that he did not owe defendant, had no right to an appeal therefrom. It is urged that if no appeal would lie in such a case in favor of one party, it should equally be denied to the other. This last proposition is, we believe, correct, as is its converse, that, in general, where one party is entitled to an appeal the same right is open to his adversary. But we cannot reconcile ourselves to following the case in 23 La. An. 213 as a precedent. In the first place, under such circumstances, as to the parties in interest, such a judgment is *final* and not *interlocutory*. To hold otherwise would be to confound the controversy between the plaintiff and the garnishee with that between plaintiff and defendant. Where the garnishee holds assets belonging to the latter in value or amount sufficient to pay the claim, and so answers, he disclaims personal interest in the premises, and can make no complaint whatever against the lawful orders of a competent court dis-

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posing of the property or money of defendant. But where he denies such indebtedness, he has a separate personal interest in resisting a judgment which might condemn him to pay what he did not owe; and upon this controversy he is entitled to trial and determination. It is for these reasons that the Code of Practice makes him a party to the suit and provides for his due citation, delay for answer, etc. In cases with more defendants than one, it often happens, by reason of the failure of some to answer or other causes, that judgments are rendered against different ones at different times, which become final as to the persons interested, although the controversy remains still open as to the others. This does not render the decrees first given interlocutory, or delay the right of appeal therefrom, until the litigation be entirely closed in the court of the first instance. As to such parties, in the cases supposed and as to garnishees, each judgment determining finally the controversy as to those interested, is susceptible, when ripe, of supporting the plea of *res judicata*. C. P. 539.

Nor do we see in what respect such a decree falls short of working an irreparable injury. To be condemned and forced to pay a sum of money not due, can surely not work one character of injury to a garnishee and another to a defendant.

For these reasons, it is ordered that the motion to dismiss the appeal herein be refused, at the cost of appellee.

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No. 3.

STATE *ex rel.* LE CONTE *et al.* v. JUDGE FOURTH DISTRICT COURT *et al.*

1. The confession of defendant, to authorize an immediate judgment thereon, must be absolute and unconditional.
2. When, upon an answer containing an admission of indebtedness, conditional, and not absolute, judgment is rendered *pro confesso*, such judgment is erroneous, and defendant is entitled to an appeal, article 567 C. P. being inapplicable to such a case.

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3. Where the amount sued for is originally sufficient, defendant cannot be deprived of an appeal by the improper division of the controversy and the rendition of two or more judgments instead of one.
4. Where a cause of action is so severed, and a decree rendered for a part of the demand, with reservations as to the balance, such a decree is definitive and not interlocutory, and may be appealed from immediately.
5. After rendition of such a partial decree and its signature the right of appeal is vested in defendant, and the plaintiff cannot by a subsequent remittitur deprive him thereof.
6. In determining the right of a party to an appeal, neither the court *a qua* nor the appellate tribunal can lawfully consider questions pertaining exclusively to the merits.

*Application for Writs of Prohibition and Mandamus to the Fourth District Court. Houston, J.*

*F. Michinard* for relator.

*W. S. Benedict* and *F. W. Baker* for respondents.

MCGLOIN, J.—This case comes to this Court by assignment from the Honorable Supreme Court of the State. It is an application for writs of mandamus and prohibition. Relators are defendants in suit No. 45,625 on the docket of the late Fourth District Court for this parish, being sued for \$600 and interest, upon the allegation that they had collected a note belonging to Mrs. Emily Williams, plaintiff in said cause, by her intrusted to them for collection. Defendants, in reply, aver that they, with the assent of petitioner, compromised the claim represented by said note with the maker for two hundred and fifty dollars in full settlement; and that they have paid plaintiff one hundred and one  $\frac{2}{10}$  dollars, on account thereof, and have tendered her the remainder of the sum actually received, which was refused. Upon this answer the plaintiff moved for judgment, as confessed, for the sum mentioned, one hundred and forty-eight  $\frac{7}{10}$  dollars, with reservation of her right to still contest for the disputed balance, and it was accorded. In due course, this decree was signed, and Le Conte & Co. moved for a suspensive appeal therefrom, which was denied. After said application and refusal, plaintiff entered a remittitur, reducing



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the amount claimed to less than five hundred dollars. Relators are now demanding writs to compel the granting of said appeal, and stay further proceedings under the judgment. The application is resisted on the following grounds :

First—The judgment is one confessed, and no appeal lies.

Second—The amount involved is less than five hundred dollars.

Third—The decree in question is interlocutory, and can therefore come up only upon a final appeal in the main cause, and that being rendered unappealable, previous interlocutory orders therein share its character and fate.

Fourth—The sum awarded being due under either theory of the case, should, in any event, be paid, whatever may be the result as to the balance of the claim.

1st. We cannot consider the averments of the answer as constituting a confession, such as authorized an immediate judgment thereon, with the reservation allowed. Claiming something under the answer, plaintiff should have taken it as it was, and as a whole. The amount actually collected is not declared to belong to her unconditionally. It forms part of the proceeds of the compromise set up. If this was unauthorized, plaintiff has no interest in the proceeds, and, as to her, the note stands uncollected. It is averred that this sum was tendered to her and refused. The confession contemplated by the authorities cited, 24 A. 17 ; 4 Rob. 144 ; 5 Rob. 447 ; 11 A. 746 ; 9 La. 413 ; 4. A. 407, is one actually or substantially unconditional ; and only upon such are the courts authorized to render judgments *pro confessis*. Where, as in this case, the answer concedes indebtedness not absolute, but entirely conditional, the confession is not complete, unless compliance with the conditions is also admitted. Here, if the compromise be effectively repudiated, defendants owe plaintiff nothing upon the allegation for moneys collected, but must return the note in kind, and account for damages occasioned by wrongful actions, or laches, if any. The surrendered note, or its amount, could be recovered from the maker only upon restoring or tendering the sum paid, un-

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der the compromise, which cannot stand as to one while it perishes for the other. This restoration Le Conte & Co. could not make, if deprived pending this controversy of the disputed fund; and so, in event of losing this cause, they could not recover and surrender the note itself, as they might have the right to do. Plaintiff, by conceding the validity of the settlement, and thus putting this issue at rest, might have rendered absolute a confession which was, otherwise, only conditional. The motion for judgment, on the contrary, and the judgment itself, reserve to her the right to still pursue for the disputed balance. Defendants should not have been held, under the circumstances, to have confessed judgment; and the case does not come under the operation of article 567 of the Code of Practice, refusing an appeal to one who has so confessed.

2d. Upon this issue it is urged that the amount of the decree complained of is less than five hundred dollars, and hence there is no jurisdiction. Such a question is determined, not by reference to the judgment rendered, but by the amount claimed in the petition, or in the demand in reconvention, as the case may be. It is not within the power of a court, by dividing for two or more judgments, what should be covered by one, or by otherwise improperly partitioning a single cause of action, to deprive a litigant of his right to appeal. If it were, the jurisdiction of Appellate Courts would be at the mercy of inferior judges, who might, were they so inclined, arbitrarily destroy it in the great majority of cases.

3d. We do not consider the decree in question as an interlocutory order. Article 538 Code of Practice defines such an order as one which does not decide upon the merits, but pronounces merely upon preliminary matters. Here, as to this particular sum, the court *a qua* has decreed upon the merits and sought to fix definitively the rights of the parties. As it is, this judgment would constitute *res adjudicata*, unless reversed in some of the methods indicated by the law; and so we have another of those distinctive marks pointed out in the Code as peculiar to definitive judgments. It is true, article 539 C. P.

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defines such judgments as deciding all the points in controversy between the parties. In this case, by the action of plaintiff, the litigation was sundered into parts, practically as though a severance had been ordered between causes improperly cumulated. In passing upon the disputed balance the court *a quo* would hardly have felt justified in taking up or reviewing the question of defendants' liability for the particular sum covered by this decree, any more than in rendering the same it passed upon the merits of that portion of the controversy which was left untouched. This judgment, therefore, being a definitive one, we believe that the right of the defendants to an appeal therefrom, immediately upon its rendition, became fixed and vested under the Constitution, and that neither judge nor litigant could deprive him of it without his consent or default.

4th. The question herein presented relates exclusively to the merits of the cause. The only matter now before us is, whether an appeal should have been allowed. With the merits of the controversy we cannot lawfully, at this time, concern ourselves, (32 A. 822). It must have been by an oversight that the learned judge *a quo* affixed his signature to an answer presenting such an issue; for, not being the final arbiter of an appealable cause, we feel convinced that his opinions upon the merits thereof were not allowed to influence his judgment in determining the question of its appealability.

For these reasons it is adjudged, that writs of mandamus and prohibition, provisionally issued herein, be made perpetual, as prayed for by relator, and be addressed to the Honorable Civil District Court for the parish of Orleans, successor, under the Constitution, to the late Fourth District Court for the parish of Orleans. It is further adjudged, that respondent, Emily Williams, pay the cost of these proceedings.

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Howard, Liquidator, vs. Lacroix.

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## No. 24.

ROBERT S. HOWARD, Liquidator, v. FRANCOIS LACROIX.

1. Because a law gives a court *exclusive* jurisdiction in specified cases, it does not thereby necessarily exclude all other jurisdiction.
2. The law establishing a court is the warrant of its authority, and it can, in default of subsequent legislation, exercise no powers not thereby conferred upon it.
3. Where the letter of a statute is doubtful or ambiguous, the courts are to seek the object the Legislature had in view, and the purposes sought to be accomplished by the enactment.
4. Although the caption of a statute cannot control its text, yet, if the latter be ambiguous, the caption furnishes the best guide as to the objects and purposes of the law.
5. Courts of limited authority can entertain no controversy not clearly within the comprehension of the laws conferring jurisdiction upon them; and where they do entertain such matters, all orders, decrees and actions made or had therein are absolutely null and void.

*Appeal from the late Fourth District Court for the Parish of Orleans. Lynch, Judge.*

*Merrick, Race & Foster* for appellant.

*Chas. Louque* for appellee.

MCGLOIN, J.—Petitioner, claiming to be liquidator of the Louisiana Mutual Insurance Company, by virtue of an order of the late Superior District Court for this parish, sues defendant upon a twelve-months bond for seven hundred and seven dollars and interest. Various exceptions are filed, only one of which need be noticed—being a denial of the capacity of plaintiff and of his right to stand in judgment. The question presented is, whether the late Superior District Court for this parish was a court of general or of limited jurisdiction. Defendant refers to the case of Union Wood Preserving Company vs. Bell, 29 A. 13. Although not entirely satisfied with the reasoning whereby the Court arrived at its conclusion in that case, a careful consideration has satisfied us that the conclusion itself is correct.

The difficulties which at first presented themselves to us were, that we did not consider the Superior District Court as being a continuation of the old Eighth District Court, with its title changed, but that it was an entirely new and distinct court; that the granting of *exclusive* jurisdiction, in certain specified cases, did not necessarily imply that it was not to have general jurisdiction as well; that the first section of the Act created an *additional* District Court for the parish of Orleans, and it might be supposed that the new court was to be an ordinary one, like the majority of the other District Courts then existing, and that the fact that only a portion of the old docket of the Eighth District Court was transferred to it did not of itself create the same distinction as to cases which were to arise in the future.

The second section declares that the new court shall have "exclusive jurisdiction" of certain cases therein specified. This term *exclusive*, as defined by Webster, may be used to convey two different ideas. Used by itself, without the preposition "of," it means, "possessed and enjoyed, to the exclusion of others, as an exclusive privilege." In connection with this preposition, it signifies that the thing or things to which it applies are not taken into account, as, "the general had five thousand troops, exclusive of artillery and cavalry." The use of this term, therefore, did not, of itself, circumscribe the authority of that court. But the first section of the Act did not purport to define expressly its jurisdiction; and as some of the District Courts, then existing, were tribunals of limited jurisdiction, it did not necessarily follow that because the new court was styled a District Court, it was to have plenary powers. Therefore, as the first section did not affect this question, the second was the only portion of the Act which conferred and defined the authority of the new tribunal. This section abstained from conferring general jurisdiction, and the courts cannot undertake to do more than the Legislature has chosen to do. Jurisdiction is not self-creative, and the law establishing a court is the sole warrant for its authority, beyond which it cannot legally go.

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Were there, however, anything dubious in this statute, a familiar rule of interpretation would require us in seeking its sense to consider the object and purposes which the General Assembly had in view when it was enacted. This rule is incorporated into our Civil Code as article 18.

While the caption of a law cannot control it, where the text is clear and unambiguous, yet it furnishes the most reliable guide in our search for the legislative purpose. *Bartlett & Waring vs. Morris*, 2 Paine C. C. 585; *Denn vs. Reid*, 10 Peter 526; *U. S. vs. Fisher*, 2 Cranch 358 (205). Referring to the caption of the Act creating the late Superior District Court for this parish, we find one of its objects declared therein to be "to fix and *limit*" its jurisdiction.

The judge *a quo*, considering that the court above named was one of limited jurisdiction, and that it was without authority *ratione materiae* to order the liquidation of a corporation not created by a special act of the Legislature, and to appoint a receiver therefor, held its orders in the premises to be absolutely null and void, and maintained defendant's exceptions, and, in our opinion, correctly.

Judgment affirmed.

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No. 48.

PAYNE, KENNEDY & CO. v. KATZ & BARNETT.

1. The court having entertained a motion for a new trial and assigned a return day therefor, should not, *ex parte* and previous to such return day, have dismissed the same.
2. The rule is, that parties to a suit are entitled to a fair trial, simplified so far as possible and freed from all alien and confusing issues.
3. Where a third person is wrongfully brought into a suit, any of the parties thereto may object to his presence.
4. Where a particular matter has been made the subject of express legislation, the courts have not, as to it, the equitable discretion mentioned in Art. 21 C. C.
5. Where a law expressly enumerates the persons and cases to which it shall be applicable, all others are excluded. "*Inclusio unius est exclusio alterius.*"

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6. A third person cannot be brought into a suit to warrant and defend the interests of a plaintiff; nor can the right to the call in warranty be exercised outside of the cases expressly enumerated by law.
7. Parties appealing to a jury are entitled to a fair and full trial by such jury, and where this has not been had the case will be remanded.

*Appeal from the Sixth District Court. Rightor, Judge.*

*Breaux & Hall* for Payne, Kennedy & Co.

*Kennard, Howe & Prentiss* for Richardson.

*Hornor & Benedict* for Katz & Barnett.

MCGLOIN, J.—Plaintiffs sue to recover the amount of two drafts, paid defendants as agents of Picard & Weil, of Bayou Sara, in this State. These drafts were drawn in the name of Robert R. Richardson, per P. A. Richardson; and the allegations are that said drafts were forgeries and that they were paid in error, and the prayer is for reimbursement. The answer denied the forgery, and averred the genuineness of the drafts; that defendants were mere agents in the matter and without interest therein; that they had accounted to their principal for the sum collected, and that if the drafts were forged the plaintiffs should bear the loss by reason of laches and contribution thereto.

Sometime after the cause was so placed at issue, and after defendants had taken material testimony under commission, plaintiffs presented a supplemental petition setting up that in their original petition they had alleged that the drafts in question were forgeries; that said allegations were based upon the representations of P. A. Richardson, by virtue of which the money paid out under said drafts had been returned to the credit of said P. A. Richardson; that the defendants in answer denied the said forgery, averring that the signatures thereto were genuine; that evidence to that effect had already been adduced; that P. A. Richardson was "bound to warrant and defend the truth of his representations;" that justice required that he should interplead; and that in case it should appear that said drafts were genuine, then judgment should be ren-

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dered in their favor against said P. A. Richardson for restitution of the amount erroneously returned to his credit. P. A. Richardson was cited to answer this petition and excepted on various grounds. His exceptions were overruled and he appeared "to interplead," as he put it, averring the truth of his representations. Just previous to the opening of the trial defendants moved the court to strike out said supplemental petition and prayer thereof, on the grounds that defendants were not parties thereto and that plaintiffs had no right thus to bring third parties into the suit. This motion was refused, on the ground that by said proceeding a multiplicity of suits was prevented. The question was duly preserved by proper bill of exceptions. The trial progressed before a jury with considerable confusion by reason of tenders of evidence admissible against one of the parties and not the others, and instructions by the court to the jury to regard and disregard the same according to circumstances. There was a verdict and judgment for plaintiffs against defendants, and also in favor of P. A. Richardson. Defendants moved for a new trial, and the court *a qua* entertained the rule, fixed a day for its argument and trial, and issued the proper notices to the adverse parties. A bill of exceptions, however, duly certified, informs us that on the day fixed, before the opening of court and in the absence of counsel, and without argument or trial, the rule was dismissed. Defendants alone appealed.

The conclusions we have arrived at upon issues presented by the bills of exception render unnecessary any discussion of the evidence. We believe the court was wrong in its action upon the rule for a new trial. While courts may possibly refuse to entertain or may dismiss a rule for a new trial at the time of its presentation, it does not follow that, having entertained the same and assigned a date for argument, as in this case, they may arbitrarily, without notice and in chambers, dismiss the motion before the time fixed for its return.

Beyond the objections to such a course by reason of its arbitrariness and the patent injustice of denying the privilege of



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reargument in the face of the permission accorded in that behalf, and of the implied admission as to its utility, if not necessity, resulting from the entertaining of the rule and fixing of a day for its hearing, there is another and more potent one. The right to appeal, suspensively, is in every case limited as to the time during which it may be exercised. This delay is accorded for useful purposes, allowing a period during which the party cast may consider what course is best for him to pursue, and, having determined, may either arrange to satisfy the judgment without the expense and other inconvenience of seizure, or secure competent securities upon his bond of appeal. So long as the judgment be unsigned this delay does not run, and pending a rule for a new trial the judgment cannot be signed. Therefore, after the court by assigning a return day to such a rule has fixed a period during which such judgment is to remain inchoate, the party cast, until such return day, need give himself no concern in connection with his appeal. But if, in the meantime, the Court may, *ex parte* dismiss the rule and sign the decree, it is possible that the party aggrieved, thrown off his guard, may remain ignorant of the action of the court until the delay accorded him by legislative wisdom for a suspensive appeal has expired or been seriously trenched upon. We, therefore, conclude, following the precedent of *Higgins vs. Haley*, 26 A. 368, to remand this cause for a due and proper disposition of said rule for a new trial.

In order to avert the delay and expense of an unnecessary appeal herein, and following the example of the Supreme Court of this State in similar contingencies, we consider it proper to express the conclusions by us arrived at upon the questions presented by said motion for a new trial, counsel for all parties having given us the advantage of full and able argument thereon, oral and by brief.

We do not think this a case where a new party should have been forced into the litigation in face of defendant's protest. It is true that, as to this party, the decree, unless set aside by an order of new trial, is final; but the right to complain of a

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misjoinder is not confined to the one who is wrongfully forced to appear. Parties to a suit are entitled to a fair trial, and in order to secure it they are, in general, entitled to insist that the litigation be simplified so far as possible and kept free from alien and distracting issues. A defendant is, therefore, protected from the disadvantage of having to meet, at one time and in the same proceeding, the attack of different persons, between whom and himself there is no privity, and who are representing different or conflicting claims. In *Dyas v. Dinkgrave*, 15 La. An. 502, the Court, speaking of such misjoinders, and after proper condemnation thereof, says: "To hold otherwise, would be at variance with the well-settled rules of pleading, and might lead to a multiplicity and confusion of parties and issues at present unknown to our system of practice." See, also, *Mayor v. Armant*, 14 La. An. 177; *Favrot v. East Baton Rouge*, 30 La. An. 607; *Gerson v. Jamar*, 30 La. An. 1206; *Surgi v. Matthews*, 24 La. An. 614; *Leverich v. Adams*, 15 La. An. 310; *Waldo v. Angomar*, 12 La. An. 74.

This rule is, of course, subject to exceptions, upon which will be found bearing a multiplicity of decisions, some of which seem contradictory. But, by careful consideration, these authorities may be systematized, when it will be found that the confiction is not as great as it would seem at first to be. Where, however, we find opposing opinions, having reduced their number, so far as possible, we can better determine which are entitled to our concurrence and application.

We may head the list of these exceptions with the right of intervention, as accorded in C. P. Art. 389 *et seq.* This, however, cannot govern this case, because here we have a *right* accorded third persons, which being intended as a privilege, it does not follow that the courts may compel its exercise and render compulsory what the law has made optional. Next in order, we may take the articles of the Code of Practice creating and regulating the right to call in warranty. C. P. 378 *et seq.*

This is also a statutory provision in the nature of a privi-

lege, and the courts are without authority to extend its provisions beyond the persons and circumstances enumerated or to otherwise vary it. If they could so do, they might similarly treat the articles of the Code relative to the other incidental demands, to the conservatory and final writs, and the various process, ordinary, executory and summary. In all these, as in other cases, the judicial will cannot be substituted for the legislative; nor is the former, either as expressed or implied, to be ignored or defeated. When some things are expressly covered by legislation and others excluded, such exclusion is an exhibition of intention as emphatic as the inclusion. It would be imposing an onerous, if at all a possible duty, upon the law-maker to require as a part of every piece of legislation a schedule or index of the things to which it is not to be applied. It is this principle which finds expression in the legal maxim, "*Inclusio unius, est exclusio alterius.*"

Nor do we think that where the Legislature has made a matter the subject of express legislation, the equitable discretion mentioned in article 21 C. C. can be exercised by the courts. It was to provide against such pretensions that this equitable power is expressly restricted by that article to cases where there is no express law. Art. 13 C. C., forbidding us, where the text is clear and free from all ambiguity, to disregard the letter of the law under pretext of pursuing its spirit, has the same object. We believe these considerations sufficient to refute the claim that courts may compel parties to interplead, or intervene, or to appear in warranty, beyond the letter of the articles of the Code regulating these subjects. Reference is made to *Morgan v. LeBlanc*, 6 La. An. 114, and *Meyers v. Eckles*, 10 A. 626, on behalf of appellees, as a justification of their proceeding. *Lafonta v. Poultz*, 6 Martin N. S. 391, might have been added. These, however, we consider as opposed to *Burbridge v. Andrews*, 23 La. An. 554; *Butler v. Stewart*, 18 La. An. 555; *Anselm v. Wilson*, 8 La. 37; *DeGreck v. Murphy*, 28 La. An. 297; *Frost v. Harrison*, 8 La. An. 123, 136; *Marchaud v. Bell*, 21 La. An. 35. In some of these

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cases the doctrine is particularly laid down that the right to the call in warranty is confined to defendants and to the cases enumerated in C. P. Art. 379.

There is another class of authorities applicable to controversies over property or rights, in or upon which there are conflicting claims so connected or interwoven as to render it unsafe and unjust, if indeed at all possible, to consider and determine them without having all parties in interest before the court. Of this class is 2 A. 987, *Clarke & Co. v. Saloy*, and its successors in matters of settling under builders' contracts, *Meshero v. Gould*, 30 A. 163, and others which it is unnecessary to enumerate. These, however, if they can be considered exceptions to the doctrine first announced, are not similar to the case now before the Court. Here there is no fund to distribute, no rival claims to the same thing to be determined, and absolutely no privity between Richardson and the defendants. He could not be affected by a decree rendered between strangers. He has absolutely no interest, other than a sentimental one, in the result, except it be possibly the remote one of escaping future controversy through the success of plaintiffs. This might support an intervention on his part, in which event defendants would have to submit to the disadvantages, because of the express legal warrant therefor. But there is no such warrant for dragging this outside party into the suit, and defendants have the right, under such circumstances, to protest against having the difficulties of his defense thus augmented or increased.

On the other hand, if plaintiffs be defeated in this action, their right to recover against Richardson, by virtue of an entirely different transaction and payment still exists, and their facilities therefor, will be, if anything, strengthened and improved rather than impaired by this litigation and the judgment therein. It is evident that bringing this stranger into this suit is, for plaintiffs, a matter entirely of convenience and not of necessity. We see no justice in sacrificing the convenience of the defendant to that of the plaintiff. We have already noticed

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the confusion occasioned by the different attitudes of the parties, and how evidence had to be hedged around with restrictions and reservations, which may or may not have been understood, or observed by the jury. We consider that the defendants were entitled to their trial by jury and to their chances of a favorable verdict, with the influence usually attached to such verdict, freed from all unwarranted circumstances calculated to mistify, embarrass or confuse, and we do not believe, under all the circumstances, that they have had such a trial; and we are, therefore, of the opinion that they are entitled to another.

Judgment reversed.

Case remanded.

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No. 49.

STATE OF LOUISIANA *ex rel.* DAY *v.* BOARD OF ASSESSORS.

The taxing power belongs to the Legislative Department, and it is entirely within the province of that department to determine the rules of assessment of property and for the collection of taxes.

The Act of 1878, page 234, does not repeal the Act of 1877, page 154.

*Appeal from Sixth District Court. Rightor Judge.*

*Bayne & Renshaw* for relators.

*S. P. Blanc* for respondents.

ROGERS, J.—On June 22, 1878, the relator purchased, at a sale made by the sheriff of the parish of Orleans, certain real estate, which had been assessed in the names of James and Samuel Watson, in the year 1877, at \$20,300. It appears from the record, that no application for a reduction of this assessment was made by the Watsons, or their representatives, in the year 1877, although the public notice required by the law had been made. On July 20, 1878, the relator made application for a reduction of the assessment to the sum of \$6750 50; this application was refused; subsequently, 27th July, 1878, he made demand for the appointment of arbitrators pursuant

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to section 88 of Act No. 96, Extra Session of 1877, of the Legislature of Louisiana; this application was also refused, and in order to compel respondents to appoint such arbitrator, a writ of mandamus is prayed for.

The taxing power, under the Constitution, belongs to the Legislature, and it is entirely within the province of that branch of the government to determine the rules of assessment and collection of taxes.

Section 87 of the Acts of 1877, p. 154, declares "that the said assessors shall complete their assessment on or before the first day of July of each year. After the first day of July, the rolls made out by the assessors, written in ink, shall be, after ten days' public notice, publicly exposed until the first day of September. *During the exposing of the rolls aforesaid*, any person aggrieved by an over assessment may make complaint thereof to the assessor of the district, who shall consider the same and submit it to the Board of Assessors, presided over by the Administrator of Assessments, hereinabove provided for, who shall pass thereon on or before the first day of September," etc.

The owners of the real estate, the assessment of which is now under consideration, made no application as required by this section; so that, as provided in section 90, page 155, the assessed valuation served as a basis for all State and city taxation for the year for which they were made and for three years thereafter, subject to the exceptions enumerated, which it is not necessary to consider here.

That the Act of 1878 (p. 234), did not repeal the provisions of the Act of 1877, or even in effect so amend section 89 of said Act as to warrant the conclusion suggested by relator, has already been determined in *State ex rel. Canton v. The Board of Assessors*, 31 An. Rep. p. 806, where the Supreme Court say, "the two acts harmonize, construing them together, it is apparent a new assessment of real property was not contemplated for 1878, but that all property hitherto omitted from the rolls should be placed thereon at once," etc.

The claim of relator's counsel that "without the prophetic

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gift, he (relator) could not have known in 1877 that he would acquire the property in 1878," is probably best answered by a brief of defendant's counsel.

"Such pretensions are baseless, for the relator can claim no greater rights, as to the property he purchased, than was possessed by the owner under whom he acquired. If that owner, Girod, could not have asked a change in the valuation in 1878, neither can relator. The latter acquired the property with a full knowledge of the law; he knew what the assessment was before he bought; he knew it was to remain unchanged for four years. Such facts and knowledge would control, and doubtless did affect, the sale—probably allowed the bidder to buy for less than the true value of the lands, if the assessment was too high. It is, then, the first owner who has the most to complain of, not the purchaser who bought with all the burdens affecting the property known to him and controlling him in his bids."

We have been unable to find any difference in the facts of the present case and the one determined by the Supreme Court in 31 An. Rep. 806; we have, however, reviewed the law and facts, and expressed our opinion, because the questions appear before us for the first time and concern matters of public importance.

The judge of the District Court properly refused the writ.  
Judgment affirmed.

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No 56.

## CHAS. S. RICE v. BOARD OF HEALTH.

The Act No. 80, of the Legislature of 1877, extended the duties and increased the powers of the Board of Health; it did not impair the act approved March 15th, 1855, which created the Board.

*Appeal from Fourth District Court. Houston, Judge.*

C. S. Rice for plaintiff.

L. O'Donnell for defendant.

ROGERS, J.—This is an action for six hundred dollars,

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claimed as the amount due plaintiff for professional services rendered defendant as attorney at law, from March 1, 1876, to May 1, 1877.

The evidence establishes the employment and the correctness of the charge.

It is contended by defendant that the plaintiff, when he accepted the employment, took or assumed the risk that the Legislature would make an appropriation to liquidate his claim.

The act of the Legislature, approved March 15, 1855, establishing the Board of Health for the promotion of quarantine, constituted that board a body corporate and empowered it to do and perform all things requisite for the purposes of the act.

The Act No. 80 of 1877, extended the duties and increased the powers of the Board of Health; it did not destroy the previous law.

The questions for our decision are: Did the defendant have authority under the law to employ the services of plaintiff?

Have the services for which compensation is claimed been performed?

In our opinion, these questions must be answered in the affirmative.

Judgment affirmed.

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No. 2.

FRANCOIS LAMARQUE v. CITY OF NEW ORLEANS.

1. The act conferring upon the City of New Orleans the right to govern, and enforce police regulations affecting private markets, does not infringe the equal rights of individuals provided for in Art. 235 of the Constitution of the State.
2. Art. 248 of the Constitution refers to the slaughtering of animals for human food, and not to the exposure of such products for sale. The public market places of the City of New Orleans are not monopolies; established in accordance with law, they are open without discrimination to all citizens; they do not exist in contravention of Art. 258 of the Constitution.



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3. The title of an Act No. 100, approved March 15, 1878, is comprehensive, and sufficiently suggests the subject-matter of the legislation. 31 An. Rep. p. 544.
4. The general powers of the city under its charter are sufficient to warrant their enacting the necessary ordinances, controlling the management of public markets and the sale of comestibles, in the interest of the public.

*Appeal from Sixth District Court. Rightor, Judge.*

*Simeon Belden* for plaintiff.

*E. H. Farrar* for defendant.

ROGERS, J.—Article 235, Constitution of the State, adopted in 1879, which provides that the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State, is not violated by an Act of the Legislature which empowers the Council of the City of New Orleans to pass ordinances and make regulations for the government and regulation of private markets; the right to govern and enforce regulations affecting such markets, does not infringe the equal rights of individuals.

A market, whether public or private, has a well accepted definition; and Art. 248 of the Constitution, which delegates to the police juries and municipal authorities the sole power to regulate the slaughtering of cattle and other live stock within their respective limits, and prohibiting a monopoly or exclusive privilege for such purposes, does not apply to places where the slaughtered cattle and other live stock is exposed for sale for purposes of human food. The business of slaughtering cattle being distinct from that of selling the products thereof.

The public markets of the City of New Orleans are open to all persons alike, and were erected under the exercise of proper corporate authority. No discrimination is made between individuals, and the plaintiff has the same rights that are enjoyed by others; and the mere fact that he does not desire to avail

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himself of them, and proposes to exercise his own will against that of the corporation, cannot declare the support and continuance of market places by the City of New Orleans a monopoly feature and in contravention of Art. 258 of the Constitution.

Art. 29 of the Constitution, providing that "every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title," is not violated by Act No. 100, approved March 15, 1878, which enacts "An Act to repeal an Act entitled an Act to regulate the private markets in the City of New Orleans, and for other purposes," being "Act No. 31 of the session of the General Assembly for one thousand eight hundred and seventy-four (1874), and to authorize the Council of the City of New Orleans to pass ordinances and make regulations for the government and regulation of private markets in said city," because the title is comprehensive and sufficiently suggests the subject-matter of the legislation. 31 An. 544.

An ordinance of the city, passed under the authority of such act, prohibiting private markets to be kept within a radius of six squares of any public market, is not null and void; because, first, the Legislature was competent to delegate its police authority to the city to regulate and govern private markets; and, secondly, the city from the inherent powers of its charter (Act No. 5, Extra Session 1870), has complete authority over its markets, to provide for their cleanliness and salubrity, and the inspection of all comestibles sold either in the markets or other public places. 2 La. 217; 27 An. 417.

And even if the right delegated to the city by the Act of 1878 was to regulate and govern private markets simply, the general powers of the corporation under its charter are sufficient to restrict the sale of comestibles to localities, in the interest of the community.

Judgment affirmed.

Rehearing refused.

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Godbold vs. Harrison.

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## No. 7.

## FLAVIUS O. GODBOLD v. W. C. HARRISON.

1. Defendant, setting up a demand in reconvention, must show, by his pleadings, that it is connected with, and incidental to, the principal demand.
2. A demand not equally liquidated with that sued upon cannot serve as a set-off or in compensation.
3. A demand not incidental to, and connected with, the principal demand, cannot be plead in reconvention.
4. The plea of compensation admits the debt sued upon, and even where the counter-demand is of such a nature as to serve for either compensation or reconvention, and defendant escapes the confession involved in the one by advancing his claim in the shape of reconvention alone, he cannot, without amendment, and after having forced plaintiff to his proof, have his plea in reconvention considered as one of compensation.
5. Where a party has been for years in the employment of another, during which time his rate of salary has been several times increased, and throughout his board has been considered included, without special mention, he had the right to suppose, in subsequent negotiations upon the same matter, that board was still included; and if the employer contemplated a change, it was incumbent upon him to mention the fact.

*Appeal from the Fourth District Court. Houston, Judge.*

*T. M. Gill for plaintiff, appellee.*

*Gibson, Hall & Montgomery for defendant.*

MCGLOIN, J. Plaintiff sues for \$623 05, alleging his employment in defendant's drug store as clerk during the year 1876, and that he was to receive in lieu of salary one-third of the net profits of the business, which proportion amounts to the sum demanded. The answer is a general denial, followed immediately by a demand in reconvention for \$334 77, with interest and costs. As the basis of this demand he sets up payments to Godbold, amounting to \$477 82, and a bill for twelve months' board at \$40 per month, amounting to \$480, the total of both claims being \$957 82. Although this remarkable answer pleads neither payment nor compensation, the sum demanded in reconvention just equals the balance left after deducting from this aggregate the sum plaintiff sues for.

To evidence under this answer plaintiff objected on the grounds that the answer contained no averment of payment as such; that the reconventional demand formed no portion of the answer proper, and its averments could not be used to supply the deficiencies of the latter, (14 A. 860); that the counter-claims set up were in nowise incidental to, or connected with, the principal demand; and that the items relied upon were not set out with sufficient precision.

The court *a qua* overruled these objections, and the points were reserved. This ruling was placed upon the ground that the answer recited facts going to establish payment of a portion of the plaintiff's claim and the extinguishment by compensation of the remainder. Upon final hearing the judge found that defendant had paid \$477 82, but that of this sum \$324 13 was for salary due previous to 1876, and that the true credit in this case was \$153 69. He also considered defendant entitled to charge for board, but only at the rate of \$25 per month, and he fixed the balance due plaintiff at \$169 36.

We do not agree with the learned judge *a quo* in his rulings upon the admission of evidence. To sanction them would, in our judgment, be to sweep away the distinctions which the Codes have drawn between the plea of payment and the incidental demands of compensation and reconvention. So far, however, as the question of payments is concerned, plaintiff by his answer in this Court, praying for augmentation of the judgment, and in his argument, has conceded these credits, as allowed in the judgment appealed from, and we are relieved from the duty of considering them. This leaves open only that portion of the demand in reconvention involving the board

A plaintiff is judged by the allegations of his petition; and as to his reconventional demand, a defendant becomes plaintiff and his rights must be also determined by the averments of his plea. In order to sustain it, the pleadings must show that the case comes within the scope of Art. 375 of the Code of Practice, and when this is denied, the averment must be made good upon the trial by competent proof. *José Pi v. Vidal*, 5 La. An. 503.

The article cited declares that, "*in order to entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be necessarily connected with, and incidental to, the same,*" etc. We discover no averment in the answer showing that this claim for board is incidental to, or connected with, the demand for salary. On the contrary, were we disposed, for the sake of argument, to go beyond the bills of exception and beyond the answer, we find the defendant's theory of the case to be, that there was no connection between the contract for salary and plaintiff's alleged indebtedness for board. 28 La. An. 574; 13 An. 137; 10 An. 629; 5 An. 303; 3 An. 617; 7 Martin's N. S. 516. A careful examination of the cases cited as being contrary to this doctrine (12 La. An. 170; 5 Rob. 179; 6 N. S. 610; 10 La. 183), will show that where at all applicable, a connection between the counter-claim advanced and the principal demand is either expressed or implied.

The learned judge *a quo*, thought proper to consider this plea in reconvention the same as one in compensation. The Code of Practice, in conjunction with the Civil Code, defines each of these incidental demands, and draws very clearly the distinctions between them. Like novation, or payment, compensation is a declaration that the claim sued upon is *extinguished* and like them, it involves an admission of the original existence of the debt, because that which has never existed cannot be extinguished. The demand in reconvention is, on the other hand, practically a cumulation of counter-suits, permitted in certain cases, and involving no such admissions. To serve for compensation, the claim must be liquidated (C. C. 2209), which is unnecessary in the case of a reconvention. Connection with the original demand, is not necessary for the former, whereas it is essential to the latter. In view of legislation almost minutely definite, courts cannot lawfully assume a discretion and practically hold that there is no difference between the two pleas, and that one may stand for the other. There are, it is true, demands, which being liquidated, and at the

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same time connected with the principal demand, might serve either plea, or probably for both if so pleaded, but the claim in question is not one of these. If it were, having at the outset a choice between the two remedies, or possibly the privilege of uniting them, and having made an election, defendant should not be permitted to reconsider his action to the prejudice of his opponent. Electing to avail himself of the right to reconvene, and so escaping the admissions involved in the plea of compensation, after forcing plaintiff to his proof, defendant should not have been permitted to shift his position. In such cases, if permitted to avail himself of the same claim, by reason of its peculiar nature, by way of compensation and reconvention, at the same time; no injustice could befall plaintiff, for his demand would stand admitted, the same as though the plea in compensation had been advanced alone.

Moreover, article 567, Code of Practice, requires compensation, or set-off, to be pleaded specially, which is certainly not done, when the plea advanced is not compensation at all, but reconvention. Civil Code, article 2209, requires a claim to be *liquidated*, in order to serve for compensation. In this case, Godbold contends that his board was to be a part of his compensation, according to his contract, and that no price was agreed upon therefor. Harrison swears that there was nothing said about board, and his answer basis this portion of his demand upon a *quantum meruit*. This claim is certainly not liquidated as contemplated by law, and so could not be urged; in the face of objection, in compensation against the balance for salary due Godbold, and stated in the written account furnished to him by defendant. *Chas. F. Berens v. R. J. Ker*, 28 La. An. 96; *Phelps v. Stone*, 30 La. An. 617; *Owen v. Vanderslice*, 9 La. An. 189; *Copely v. Lambeth*, 9 Rob. 137; *N. O. Gaslight Co. v. Hill*, 2 La. An. 402; *Coleman v. Marble*, 9 La. An. 476. In *Ferriber v. Latting*, 9 An. 169, cited by defendant, no objection was interposed to the plea in compensation for unliquidated board, etc.

The learned judge *a quo* was, therefore, wrong in giving to this plea, the effect of one in compensation.

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We feel all the more assured in coming to our conclusion, by the fact, that even had we gone into the evidence, our decree would have been the same. Godbold had been for years in the employment of defendant. His salary had been repeatedly increased, and with every change, board had been included, although not specially mentioned. When it came to making this last one, Godbold had the right to suppose that his board would be still included, as before, and if Harrison contemplated any change in this respect, it was his duty to have so declared.

For these reasons, the judgment appealed from is reversed, and judgment is now rendered in favor of plaintiff, Flabius C. Godbold, and against defendant, William C. Harrison, in the sum of four hundred and sixty-nine  $\frac{1}{10}$ % dollars, with legal interest from December 31, 1876, defendant to pay costs in both courts.

Rehearing refused.

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No. 39.

CLAVARIE & NOBLE v. EUGENE WAGGAMAN *et al.*

1. Sheriffs, under writs directing, in general terms, the seizure of a debtor's property, must, at their peril, primarily determine whether the property to be seized belongs to the defendant or not. .
2. Under writs commanding the seizure of specific property, the sheriffs, ordinarily, have no discretion and incur no responsibility, being held only to look to the jurisdiction of the court, and to the proper execution of its mandate.
3. Courts must presume that legislators are familiar with the principles of law applicable to questions they have under consideration, but this is not an absolute presumption.
4. Where it is reasonably possible, courts will adopt an interpretation which would give to a law a wise and equitable purpose and effect, rather than one which is unjust or absurd.
5. Nevertheless, the courts are bound, above all things, to seek for and enforce the legislative intent; and so long as this is within constitutional

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limits, apparent injustice or absurdity is not a reason authorizing disobedience to its mandates, or a refusal of enforcement.

6. The presumption that the Legislature had some purpose to be accomplished in all its enactments is conclusive, and courts are not at liberty to adopt interpretations which are virtual repeals.
7. Meaning of the term, "mesne process," as found in the old common law.
8. Courts will take judicial cognizance of the meaning of the words and terms forming part of the prevalent language of a country.
9. Opinion in *E. Conery & Son vs. Eugene Waggaman* affirmed, on rehearing, in this case.

*Appeal from Sixth District Court. Rightor, Judge.*

*Bentinck Egan* for plaintiff.

*T. & J. Ellis* for defendant.

MCGLOIN, J.—Concerning the facts in this case, as set out in the petition, there is no dispute. The question of law involved is, whether the civil sheriff of this parish was justified in releasing from seizure the steamboat *Seminole*, which he had taken under a writ of sequestration, basing his action upon plaintiff's neglect to furnish bond of indemnity demanded under section 3579 Revised Statutes. That section authorizes sheriffs who have seized, or may be required to seize, personal property, "by virtue of any mesne or final process, to demand, when such property is claimed by a third person, a bond of indemnity from the person or persons in whose interest the process issued." By section 3581, he is authorized either to release the seizure or refuse to seize, as the case may be, should such bond not be furnished within twenty-four hours after demand. Section 3581 provides for the assignment of such bond to the claimant, relieving the sheriff from liability for damages, unless the obligors of such bond be insolvent.

The responsibility of a sheriff towards parties whose property he takes into his custody, is not the same under all writs. In cases of *feri facias* and ordinary attachment, the mandate is, to seize the effects of defendant without specification, leaving him to determine, primarily, the question of ownership, which he must do at his peril. Levying upon that which does



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not belong to the debtor is not a compliance with the mandate of the court, and he stands liable for damages. Freeman on Executions, § 254.

Where, however, as in cases of seizure and sale, sequestration and provisional seizure, the court directs the taking of particular property, no discretion whatever rests with the executive officer. He, therefore, incurs no responsibility by virtue of the levy, provided only he sees to the jurisdiction of the court and properly executes the writ. *Went v. Morgan*, 3 La. 313; *Driggs v. Moran*, 10 Rob. 124; *Elmore v. Hufty*, 13 La. An. 227; *Hunter v. Bell*, 14 La. An. 142; *Rau v. Katz*, 26 La. An. 464; *State ex rel. v. Vaughn*, 29 A. 707

Indeed, the dignity of judicial tribunals, and, in fact, their efficiency, depending upon the respect and obedience accorded their lawful mandates, disobedience thereto, or even hesitation in their execution, is not to be tolerated with safety.

If the property seized in such cases should not have been levied upon, the fault lies alone with the court, or with the parties who have wrongfully misled it. The law has rendered necessary, before the issuance of such writs, the production of certain evidence of an applicant's rights thereto; and in cases of sequestration, a bond is required in the interest of all persons to be affected by the order. Being bound, as we are, to presume that the legislators are familiar with the principles of law applicable to matters before them, we cannot imagine that the legislation in question was intended to apply to cases such as the one under consideration; and that it would impose the idle obligation of indemnifying a public officer against a peril to which he was not exposed. Nor is it supposable that it was intended in this manner, obscure and indirect, to provide a second bond in favor of possible claimants in addition to that exacted previous to the issuance of the writ. Such a supposition is hostile to the patent purpose of the law, and we are not to presume that legislation conceals or obscures its aims or endeavors to accomplish them by routes that are covert and circuitous.

Nevertheless, were we satisfied that the Legislature really had such motives, its will must be enforced if not respected. The reasoning suggested is merely employed with a view to establishing presumptions, which are to control if the legislative purpose be left in doubt. C. C. 18. The writ of sequestration is certainly not *final process*; and we must see if it be covered by the term "*mesne process*," which is evidently borrowed from the English law. *Mesne* is defined by Bouvier and Webster as signifying "intermediate, the middle, between two extremes, that part between the commencement and the end, as it relates to time," and "middle, intervening." Bouvier, amongst his illustrations, gives "*mesne process* as that which issued in a suit between the original and final process." His further definitions under headings "*mesne process*" and "*process in practice*," are substantially the same. The citations he employs support the position that the point of distinction between process, original and mesne, lies solely in the stage of the suit at which it issued. Blackstone, Book IV, p. 279; Stephen's Commentaries, vol. 1, pp. 102, 104; Finch's Law, pp. 237, 436.

If we endeavor to compare the course of litigation under our system to the more cumbersome one of the old common law, we might consider our citation as being equivalent to their *original process*, and all that intervened between citation and execution as *mesne process*. Adopting this view, we find by our Code of Practice, Art. 276 and its associates, that the writ of sequestration is usually demanded in the same petition with citation, and that the two may, and usually do, issue together. We find also by Art. 237, that the conservatory writs may issue before the citation, and even before the filing of the petition praying for the same. Under such circumstances, we can scarcely consider writs so issuing as being covered by the term *mesne*, or as being in any sense "intermediate." It is true, that such writs may issue at a later stage of the suit, but even then, they can be obtained only by supplemental or amended petition, accompanied by citation, and the essential

nature of the one writ can no more be affected by this possibility than the other.

But Blackstone and Bouvier and Webster, copying, declare also: "Mesne process is also sometimes put in contradistinction to final process or process of execution, and then it signifies all such process as intervenes between *the beginning* and end of a suit."

This clause, for a time, caused much wavering and uncertainty upon our part. Closer study, however, satisfied us that, at common law, the term *process* was not applied to the proceeding which inaugurated a suit, and was, therefore, most akin to our citation. Blackstone, Book IV, p. 272, defines this first step or action as the "original, or original writ." The same author, at page 279, says: The next step for carrying on the suit, after suing out the *original*, is called *the process*. It is then that he divides this process itself into original and mesne. So Finch, page 436, declares: "Judicial process is a process out of that court where the original is returned, prosecuting the action," etc. Further on we find: "Judicial process or mesne process, are in the nature of new originals." The same author defines the *writ* as "a latin letter of the King's, from thence, in parchment, sealed with his seal," etc. Finch's Law, p. 237. So Tidds' Practice, vol. 1 p. 103, makes this declaration: "Original writs are calculated for the commencement or removal of actions," etc. We, therefore, cannot satisfy ourselves that what are known under our law as conservatory writs come, under any aspect of the question, under the definition of mesne process. We are fortified in this opinion by the conclusion that the conservatory writ of sequestration, as existing in our law, and having for its object the bringing into judicial custody of property, specially affected in favor of the claim sued upon, pending the suit, and not simply to compel defendants to appear or to execute judgments against them, was unknown to the common law. It was certainly not amongst the class of proceedings which went by the title of *mesne process*.

There is another consideration which satisfies us with the result of our investigations in this case. The writs of sequestration, provisional seizure and attachment, as defined by our Code of Practice, issue against property where a plaintiff has his right in, to or against the same, by reason of a privilege or the non-residence, fraud, etc., of the debtor. They constitute proceedings against the property generally cumulated with those against his person. Their object is usually, as already stated, to bring that property before the court, there to hold it pending the suit, and to abide its issue. While strictly speaking they are not actions *exclusively in rem*, as known to our law and defined in Arts. 290, 291, C. P.; yet ordinary suits, in which conservative writs issued have generally been considered by our courts as being in their nature proceedings both *in rem* and *in personam*. Such has been the intimation where writs of sequestration were concerned, in *Block Brothers v. Bartha*, 20 La. An. 344; *Peterson v. Willard*, 17 La. An. 96. In cases of attachment, the same intimation is found in *Page v. Generes*, 6 La. An. 549, *Woodworth v. Lemmerman*, 19 La. An. 524; *Boughton v. King*, 2 La. An. 569. In cases of provisional seizure we have *Henning v. Steamer St. Helena*, 5 La. An. 349; *Holmes v. Cheftain*, 1 La. An. 136; *Lalaurie v. Woods*, 8 La. An. 366; *McGunnigle v. Bowman*, 14 La. 447.

It is, therefore, in accordance with our jurisprudence to consider the conservatory writs allowed in such cases to issue simultaneously with and even before the citation as being themselves in the nature of original process or writs directed against the property of defendant or in dispute, as the case may be, and intended to subject it to the jurisdiction of the court, either alone or in conjunction with the person of the debtor.

The plaintiffs have fully proven the amount of the loss resulting to them by the fault complained of as required by R. S. Sec. 3594.

For these reasons it is decreed that the judgment appealed from be reversed, and that plaintiffs, Clavarie & Noble, do now

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have judgment against defendant, Eugene Waggaman, late civil sheriff of this parish, as principal, in the full sum of four hundred and eighty-seven  $\frac{2}{3}$  dollars (\$487  $\frac{2}{3}$ ), with legal interest from April 27th, 1875, amount of the claim and judgment in the suit whence issued the writ in question, and for the further sum of forty-two dollars, costs of clerk and sheriff in said cause, and that defendants, S. H. Kennedy and Lafayette Folger, sureties upon the official bond of said sheriff, be severally condemned in the like amount, and that defendants pay all costs of this suit.

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ON REHEARING.

MCGLOIN, J.—After a careful re-examination of the issues presented in this cause, we have not been led to recede from the later conclusions arrived at, and fully recited in the opinion rendered in the similar case of *E. Conery & Son v. same defendants*.

We recognize the absurdity of the legislative action in authorizing sheriffs to exact, before executing a writ, from which, if properly enforced, no liability to him can arise, a bond of indemnity. But, as we have already declared, if such were the legislative purpose, we have no right to obstruct or defeat it, for the question of policy or impolicy of legislation is not primarily one of a judicial nature.

We are fully disposed to avail ourselves of the judicial privileges—we may even say to respect the duty of selecting interpretations which indicate the wisdom of the legislator rather than those imputing to him ignorance or folly. This right or duty, however, can only intervene where there is room for the reasonable application of either interpretation. It cannot justify courts in imposing upon a statute a meaning hostile to its language or against its evident intent. The functions of courts are exclusively interpretative, and their first duty is to seek honestly and fairly for the legislative purpose, and without striving, by cunning devices in the applica-

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tion of language, to defeat or restrict what they are convinced is the object of the law.

The constitutions, State and National, lay down all the checks and restrictions to which legislation is subjected, and within the bounds prescribed by these instruments the Legislature has unlimited authority and the absolute power to be unwise or even arbitrary. Therefore, while the courts will not lightly attribute to it purposes which seem to them unwise, or even unjust, yet, if such a purpose be patent, the only restrictions judicial tribunals are at liberty to apply are those expressed or clearly implied by the constitutional law. If these be not applicable or sufficient, there may be a case of hardship or oppression, but the remedy lies not with the courts, which are compelled to apply the law as it is given to them.

Seeking, therefore, the legislative intent, we have been forced to the conclusion, that the General Assembly when enacting the law under consideration, employed the term "mesne process" in its generally accepted sense, that which prevails with Bench and Bar of the State. This undoubtedly held the term as applicable to the conservatory acts or writs defined in our Code of Practice.

Pending the final determination of this cause, the organ of the court, in the delivery of this opinion, took occasion to approach, without presenting or discussing the question at issue in this cause, occupants of the Bench and members of the Bar of this city for their impression as to the meaning or application of the term under consideration, and the unvariable answer was that it covered the conservatory writs defined in the Code. The meaning of words forming part of the prevalent language of a country is a matter of which courts must take judicial cognizance, just as they do of its history or geography, and the court is satisfied with the correctness of its conclusions as to the sense to be given to the words "mesne process."

Nor is there open to us any avenue by which to escape the absurdity commented upon. If we adopt the contracted definition of the old common law, as done in the first opinion in

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this case, we strike out from the scope and operation of the statute every writ affecting property, not final in its nature, known to our legislation, and the law in question is left without force or effect whatever.

This we cannot do, because the presumption that the Legislature intended to accomplish some object in the enactment of every statute is conclusive, and the courts cannot accept an interpretation which is virtually a repeal.

Judgment affirmed, with costs in both courts.

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No. 40.

E. CONERY & SON v. EUGENE WAGGAMAN *et al.*

1. The titles and indices used by the editors of the Codes and Statutes, while no portion of the law, may serve in cases of doubt as going to show the meaning usually assigned to particular words or expressions.
2. Under our Code the distinction between laws which are odious and laws entitled to favor, with a view to narrowing or extending their construction, cannot be made by the courts. C. C. Art. 20.
3. The term "meane process" has been adopted into American legal terminology with a wider application than that accorded it under the old English law.
4. The term, as used in R. S. Sec. 3579, does cover the writ of sequestration as known to our law, and sheriffs may demand bonds of indemnity before executing the same.
5. Judges should avoid pride of opinion, and acknowledge freely and correct fully all errors into which they may fall.

*Appeal from Sixth District Court. Rightor, Judge.*

*Bentinck Egan* for plaintiff.

*T. & J. Ellis* for defendants.

MCGLOIN, J.—This case presents features similar to those of *Clavarie & Noble* against same defendants, lately decided, in which we have determined to accord a rehearing. We decided in the opinion read in that case that the writ of sequestration, as known to our law, was not covered by the words

"mesne process," as used in section 3579 of the Revised Statutes of this State. We arrived at this conclusion after a careful study of the signification of the words "mesne process" under the English law, and satisfied ourselves that the writ in question was not covered by that term as used in the common law of England. No attempt has been made in this case to show error in this conclusion, but, on the contrary, its soundness seems conceded. The question is, however, here presented as to whether the term "mesne process" has not made its way into American judicial terminology with a different and more extended signification, such as does include the writ in question; and whether it was not from this latter rather than the old English law that the term was taken by the Legislature of Louisiana. A careful examination of such authorities as have been accessible to us, inclines us to the opinion that the answer to this question must be an affirmative one.

By the United States Bankrupt Law of 1867, Sec. 5044, the judge or register passed all the property of the bankrupt over to the assignee, "although the same is then attached, *on mesne process*, as the property of the debtor." In this respect it differed from the Bankrupt Acts of 1800 and 1841, which respected liens already fixed, making no reference to such attachments.

Under those older bankrupt laws much litigation arose as to what constituted a lien, such as contemplated by the saving clauses in said acts. It seems that in the New England States there has existed for a long period a writ of attachment having many points of similarity to the attachment known to our own law. The question was frequently presented for judicial determination, whether these attachments were to be respected under said acts. In the great majority of the authorities arising from the litigation of this issue these writs have been designated as "attachments under *mesne process*." *Peck v. Jenner*, 7 Howard, 612; *Davenport v. Tillon*, 51 Mass. (10 Metcalf) 321; *Kittridge v. Warren*, 14 N. H. 518; *Downer v. Brackett*, 21 Vermont, 599; *Wallace v. Treadwell*, 6 Pick. 455; *Atlas Bank*



*v. Nahant Bank*, 23 Pick. 488; *Ex parte Foster*, 2 Story 140; *In re Bellows & Peck*, 3 Story, 428; *In re Cook*, 2 Story, 376.

And under the last Bankrupt Act the question as to what constituted an attachment under mesne process, as mentioned therein, has been often presented. In the case of *In re Joslyn*, 2 Bissel, 235, it was held that a distress warrant, issued under the statutes of Illinois, for rent, although not an attachment under mesne process, was in the nature of, or equivalent to, such an attachment. This case was followed and approved in *Morgan v. Campbell*, 22 Wall. 394. In *Corner v. Mallory*, 31 Md. 469, the court held an attachment against a foreign debtor to be an attachment under *mesne process*. In *Mixer v. Excelsior Co.* 65 N. C. 552, the court held that an attachment under the laws of North Carolina is *prior to final judgment*, and, therefore, mesne process. *Pennington v. Lowenstein*, 1 B. R. 570 is to the effect that all process issued in a suit prior to execution is *mesne process*.

We find also in the Acts of Congress, approved August 1st, 1842, and June 17th, 1844 (5 Stats. at Large, 498 and 678), the writ of arrest as existing in the District of Columbia, and somewhat similar to our own writ of the same name, regulated under the designation of "writs of arrest on *mesne process*." So, also, Sedgwick on the Measure of Damages, Chap. XXI, p. 513 *et seq.*, treats of actions against sheriffs for failure to execute *mesne process*, and cites cases of arrest of the debtor and a case of replevin (p. 520) as being covered by the term in question.

Coming within our own State, the sense in which this term was, and is held, appears from several circumstances. In Greiner's Code of Practice the title given to that section which regulates the conservatory writs is in these words: "Conservatory, or *Mesne Process*." In the indices of the Codes of Practice, published by Greiner, Fuqua and Voorhees, the articles relating to these writs are given under the heading "Mesne Process." Although such title-heads and indices may not constitute any portion of the legislation to which they may be attached by the editors or publishers, yet the gentlemen named

were all eminent in the profession, and their course in this connection goes to show the opinion of the bar as to the sense and meaning of the term. Indeed, the Code of Greiner, dating from before the origin of the legislation under examination and in general use at the date of its original enactment, must have been potent in shaping a general conception of the signification of the term *mesne process*, and may be justly supposed to have led the Legislature to use the same with the meaning which had been thus accorded to it.

So, in *Fluornoy v. Milling*, 15 La. An. 473, while the Court does not directly pass upon this issue, although presented, yet it is evident that neither court nor counsel doubted the application of the legislation under discussion to the writ of sequestration, and the court declares that bonds of indemnity, given under such legislation cover the damages resulting from the act of seizure, as well as from the detention of property taken.

We have, therefore, come to the conclusion that the term "mesne process," as now used in this country, and particularly in this State by Bench and Bar has not the restricted meaning given in Bouvier, and taken from the English law, but that it is used to cover any writ issuing in the course of a litigation outside of the summons or citation and before judgment. That this is a deviation from the original meaning, we believe; but living languages are subject to change with time, and we cannot expect or compel legal nomenclature to remain immutable. Civil Code, articles 15 and 1947, require us to accord to technical terms and phrases their *received* meaning with those learned in the art, trade or profession to which they refer, and this we propose to do.

It is true that the Legislature did a vain thing in allowing sheriffs to demand a bond of indemnity in cases such as this, where they are ordered by the court to seize specific property, and incur no liability by complying with the order; and that plaintiffs are needlessly harrassed thereby; and that the Legislature must have been ignorant or forgetful of these principles when enacting this law, but all this is no concern of the courts.

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Our only mission is to seek for and enforce the legislative intent, and for its folly, if any, we are not responsible. Should hardships be inflicted, as has been done in this case, the fault lies with the legislator, and a remedy must be sought at his hands. Article 20 of our Civil Code is to the effect that "the distinction of laws, into odious laws and laws entitled to favor, with a view to narrowing or extending their construction, cannot be made by those whose duty it is to interpret them." We propose to respect this provision and restrain ourselves strictly within the boundaries of our power, which is interpretative and not legislative.

It is the sacred duty of judges to avoid all pride of opinion, and to acknowledge freely and correct fairly every mistake. In this manner alone can they render impartial justice or give value to their opinions as precedents. We must, therefore, recede from the conclusion reached in the case of Clavarie & Noble, and in this case affirm the judgment of the court *a qua*, which was for defendants.

Rehearing refused.

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No. 64.STATE *ex rel.* B. R. FORMAN *v.* CITY OF NEW ORLEANS.

1. The moneys of the City of New Orleans are to be received and disbursed according to law, and the sheriff cannot be required to administer or disburse any portion thereof which may be in his hands.
2. Where a person has obtained a judgment against the City of New Orleans declaring a certain thing, for which it is responsible, to be a nuisance, and ordering the sheriff to abate it, that officer has the same power to remove it as he would have were the municipal corporation not the defendant.
3. Therefore, the relator in this case has already an adequate remedy, and cannot invoke the writ of mandamus.

*Appeal from the Sixth District Court. Rightor, Judge.*

*B. R. Forman* for relator.

*Samuel P. Blanc* for respondent.

ROGERS, J.—On the 15th of December, 1877. the relator

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obtained a judgment commanding the Mayor and Administrators of the City of New Orleans to cause to be removed the banks of earth, through the entire width of Murat street, at the intersection of Orleans street, on both sides of the Orleans Canal, to the level of the Metairie Ridge, and to construct a good and suitable bridge across said canal, at the intersection of Murat street, of the full width of Murat street, so as to restore to the use of said Murat street the free and unobstructed use of plaintiff and the public from Canal street to the City Park, at an expense not to exceed five hundred dollars, and that the same be done and completed within thirty days after signing this judgment; and in default thereof, that said street be opened and bridge constructed, as above decreed by the sheriff at the expense and cost of the City of New Orleans.

This judgment was not appealed from and is, therefore, final. The city authorities have failed to obey the decree, and the relator having sought to obtain an obedience by petitions and solicitations, instituted the present action to compel the civil sheriff to execute the judgment rendered in 1877, and retain for such purpose a sufficient sum out of any and all moneys that may come into his hands and belonging to the City of New Orleans, this order was granted by the lower court.

The judgment is erroneous, because the moneys of the City of New Orleans have been dedicated by law to certain purposes, and are received and disbursed in accordance with express law, and to place the administration of its affairs with the sheriff, however limited that administration, would be illegal. While we believe that the conduct of the city officials in this matter has been reprehensible, and the record offers no excuse, we cannot look with favor upon the character of the relief sought by relator. There are, under the city charter, certain administrators charged with particular public duties. In this matter the city answers, the Administrator of Improvements is charged with the superintendence and repair of streets. If it is his duty to execute the judgment, we have no doubt he

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Brady & McLellan vs. Steamboat Eva, Masters and Owners.

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is sufficiently amenable to the law. Further, the relator has obtained a final judgment, and the means of its execution are in his hands, inasmuch as the sheriff can no more refuse to abate the nuisance complained of in this case than he could refuse to obey any other judgment of a court, and the writ of mandamus can only be invoked in default of other adequate remedy. C. P. 830.

Judgment reversed. Mandamus refused.

Rehearing refused.

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NO. 55.

BRADY & MCLELLAN v. STEAMBOAT EVA, MASTERS AND OWNERS.

1. In default of agreement to that effect, express or implied, persons who do work of construction or repair are not bound to charge those who employ them, for the material and labor furnished, no more than they themselves are made to pay.
2. Such persons, when not mere superintendants disbursing a principal's money, are entitled to compensation for their own services, the judgment and experience and skill employed, and for the use of their tools and appliances, and for the guarantees they assume. Where there is no agreement to the contrary, they may remunerate themselves by charging such advance upon these disbursements as will in the aggregate amount to a fair compensation for their own services, etc.
3. In the absence of express stipulation, the value of such services, etc., as in other cases, is to be determined according to the law of supply and demand. So, where the number engaged in any particular business is limited they may adopt card-rates, which, being observed by all, establish a market-price which is fixed and general.

*Appeal from Fifth District Court. Rogers, Judge.*

*Hornor & Benedict and F. W. Baker for plaintiffs.*

*G. L. Hall for defendant, appellant.*

The opinion of the Court in this case was concurred in by L. L. Levy, Esq., judge *ad hoc*, *vice* Rogers, judge, recused, having decided the controversy in the lower court.

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Brady & McLellan vs. Steamboat Eva, Masters and Owners.

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MCGLOIN, J. Plaintiffs sue the owner and master of the steamboat Eva, *in personam*, and set up a privilege upon the boat, issuing against it a writ of provisional seizure. The demand is for hauling the steamboat out of the water on the ways of plaintiffs' dock and ship yard and for labor and material used in repairing her. The correctness of the bill, as to quantity and character of the labor and materials charged for is amply proven. The prices, however, of the materials used are considerably above the retail prices charged by merchants at their stores for articles of similar kinds. Plaintiffs, however, show that all the dock yards of this city have adopted a schedule of prices to be charged for labor and material applied upon vessels under repair, and that these rates are generally known to persons dealing with them. A copy of the printed card of rates was offered in evidence, and the bill sued upon seems, on the whole, to agree therewith. The judge *a quo* made some deductions, and these we think sufficient to cover any excess, if any existed.

We do not consider that, in default of agreement to such effect, the persons whose business it is to do work either of construction or repair for others are bound to charge no more than such sum as they may have themselves to pay. Were such the rule, persons pursuing avocations such as that of plaintiffs might find themselves compelled to furnish the use of private capital and of their skill and experience to others, and to assume guarantees as to the proficiency of workmen engaged and the soundness of material used, without any compensation whatsoever. We consider that such persons are entitled to remuneration for the use of their property and for the exercise of their judgment and experience and for the service and responsibility of securing competent labor and fitting material, and that they may take payment therefor either by a direct charge, *eo nomine*, or by placing a reasonable advance upon the amount of their disbursements.

And to arrive at what shall be a reasonable charge for labor and material, under such circumstances, we must have proper

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Denegre vs. Bayly, Jr.

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regard for the law of supply and demand and be governed by what the exigencies of trade permit persons in the same business as plaintiffs to demand and receive. The schedule of prices adopted and enforced in this case could not be long upheld if parties repairing or building vessels could secure from particular yards, of sufficient capacity, cheaper rates, any more than an undue valuation could be maintained in the market upon flour or other commercial commodities.

We believe the judgment appealed from should not be disturbed, but we do not consider the appeal as frivolous, and so shall not impose damages as prayed for by appellees.

Judgment affirmed, with costs of both courts.

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No. 51.

## HENRY DENEGRE v. GEO. M. BAYLY, JR.

1. As a matter of pleading there is a distinction between the plea of a want of consideration and a failure of consideration; the latter necessarily admits the original existence of a consideration, and in all cases involves an assumption of the burden of proof.
2. In cases where the evidence is doubtful, or the testimony conflicting, the Court will not readily disturb the finding of the jury and of the judge below.

*Appeal from the Fourth District Court. Houston, Judge.*

*George Denegre* for plaintiff.

*Kennard, Howe & Prentiss* for defendant.

ROGERS, J.—This is an action on a promissory note for \$943  $\frac{1}{10}\%$ , stipulating on its face that it was given for value received.

The defence is a failure of the consideration. We do not consider the plea of general issue, because waived by the plea of failure of consideration.

An obligation, such as the one upon which this suit is based, establishes *prima facie* an indebtedness and promise to pay,

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and its execution can be defeated only by the obligor establishing special reasons in defence. There is a distinction between a plea of want of consideration and a failure of consideration; for the latter admits that at the execution of the instrument a consideration did exist. It has been wisely held that when suspicious circumstances have been developed and a cloud cast upon the consideration, the court should require full proof in support of a plaintiff's demand; but the rule is not the same when a party seeks to avoid an obligation which he once admitted was valid, but for some reason subsequent has become extinguished; that this distinction is obviously in the interest of good morals cannot be denied.

There is some conflict in the evidence before us in the record, arising from the position of the contesting parties as to the fact whether the promise given by plaintiffs were to *vote for a composition in bankruptcy, or not to oppose a composition*. The jury who tried the case, and the learned judge who presided and refused a new trial, were of opinion that the facts favored the claim of plaintiffs. After examining the evidence submitted, we do not feel at liberty to disregard the verdict and the judgment rendered thereon. The jurisprudence of this State is well settled, that great weight will be given to the verdict of a jury on questions of fact, unless manifestly erroneous and unsatisfactory, particularly when confirmed by the judge presiding at the trial, who has seen and heard the witnesses.

Judgment affirmed.

Rehearing refused.

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NO. 1.

LOCHTE & CORDES v. JEAN M. GÉLÉ.

1. Where a party permits his name to be affixed over the place of business of another, he holds himself out to the world as proprietor, and persons dealing with the true owner, not aware of his interest, and giving credit to the apparent owner, can hold the latter.
2. Men have the right to suppose that their neighbors will speak and act the truth, and to transact their business accordingly.



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Lochte & Cordes vs. Gélé.

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3. Representations, binding, by way of estoppel, may be by actions as well as words.
4. It is a reasonable presumption that property is in the use of its owner, and that when one purchases property, adapted to a special use, he does so with a view to applying it to such special use in his own interest.
5. When a person conducts a certain business, to which the services of clerks and of a superintendent or manager is essential, and he does not himself act as such manager, there is a representation that the parties actually engaged in the performance of these essential duties are his agents with necessary powers.
6. A person, however, who gives the exclusive credit to a disclosed agent, apparent or real, cannot hold the principal.
7. The manner of charging upon the books of a merchant, in such a case as this, furnishes *prima facie* evidence as to the placing of the credit.

*Appeal from Second Judicial District Court. Pardee, Judge.*

*E. N. Whittemore* for plaintiffs, appellant.

*J. D. Coleman* for defendant.

**McGLOIN, J.**—Plaintiffs sue defendant for a balance upon a bill of merchandise sold and delivered. The facts are as follows: One John Gross was for a long period of time owner of certain stalls or stands, in the Magazine Market of this city, at which he sold coffee, milk and chocolate, and other cooked food. During this time he was a customer of plaintiffs, who were wholesale grocers. On June 3d, 1879, by authentic act, for three thousand dollars, recited as paid cash, said Gross sold out his said coffee stands, and all the trade, custom and patronage connected therewith, to defendant. This price, however, was not paid in cash, as recited, twenty-four hundred dollars thereof being applied to the extinguishment of a debt due Gélé, the balance of six hundred dollars being all the cash actually paid. Gross was very much indebted, and the purpose of this transaction, at least on his part, seems to have been to relieve himself from the pressure of his creditors. When this sale was made, Gross, it appears, was to continue the business for his own account, Gélé binding him to purchase

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all the milk used from him (Gélé), he being by occupation a milk or dairy man. Gross, however, whose name had been heretofore over these stands, asked Gélé to allow him to place thereafter his (Gélé's) name over the stall in place of the name John Gross. This Gélé agreed to do, and the change was made at Gélé's expense. The plaintiffs heard of this sale shortly after its occurrence, and their salesman and employee saw the new sign, which was sufficiently conspicuous to be seen from the street cars as they passed the market. This salesman also swears that he made, about this time, inquiries as to Gélé's solvency, and received satisfactory replies.

On July 1st, 1879, Gross called at plaintiffs' store to purchase supplies for the stands, spoke of the sale, and told plaintiffs he was buying for Gélé, and to make out the bills hereafter in his name. This request was complied with, and a new account was opened upon the books of Lochte & Cordes, in the name of Jean M. Gélé. These facts we consider sufficient to hold defendant liable for the bill sued upon.

The law is well settled, that persons are held bound by the representations, express or implied, they make to others when acted upon by those to whom they have been made, and when the parties so acting would be injured by the withdrawal or repudiation thereof. Persons have the right to presume that their fellows will speak and act the truth, and to regulate their conduct accordingly, and, when they have so done, they will be protected. It would certainly be detrimental to the public morals and the honor of commerce, and introduce inconvenience and confusion in all business relations, if the law did not favor the implied confidence of men in each other's veracity and integrity.

Nor need representations, to be governed by these principles, be spoken or written; but they may be derived from actions, for these influence the judgment and conduct of men as readily as words. Indeed, in many respects, as confessions or declarations, they are more satisfactory and convincing

than language itself, which is so often lightly and thoughtlessly employed.

It is a reasonable presumption, in default of contrary notice or circumstances, that property in employment, is being used by the owner. It is also a legitimate supposition when property, adapted and devoted to a particular use, is purchased, that the motive of the person acquiring is to continue it in the same employment for his own benefit. While these presumptions are not conclusive, or even sufficient of themselves to determine issues such as those presented in this case, they are introductory to, and supportive of, others, which do determine them. They were considerations which might influence plaintiffs, in the matter of giving credit, and, as such, they bear upon the question of recourse, and affect the burden of proof.

It is a custom prevailing in all commercial communities for merchants and others transacting any business to make use of signs, giving the name of the proprietor, and the character of the business conducted in the store, shop or office upon which such signs are placed. When, therefore, a name or names appear upon such a sign, over any place of business, it is a declaration that the business thereat conducted, is for the benefit of the person or persons whose name or names are so used. When, therefore, Gélé placed his name over these stands, he declared to the world, what they had reason before to suppose, by reason of his purchase, that the business being conducted thereat was in his interest, and for his individual account. As this business needed employees for its transaction, there was the additional declaration that the persons therein engaged were his servants, authorized to bind him to the extent that such employees, in such trade, usually bind their principals. Civil Code, Art. 3000; Story on Agency, § 106. Still further, as such business needed a manager, and a person to buy and sell, and, as Gélé did not perform these duties himself, there was a declaration that the employee actually performing these essential services was his agent for these purposes. As the evidence shows that Gross, in this case, did

so manage the business, and make purchases, and that Gélé neither did these things himself, nor furnished any person other than Gross for that purpose, Gross, therefore, stood the declared agent of Gélé, with all necessary powers.

Lochte & Cordes knowing Gélé's purchase, cognizant of the change in the signs, and the continuance of the business under the management of Gross, had the right to consider Gélé the principal and Gross the agent, with proper authority. They had, also, the right to take Gross' statement and directions as to the manner of charging the goods, and these were binding upon Gélé, in default of notice to Lochte & Cordes as to the true condition of affairs. These principles are well supported by authorities, and have been applied to contracts of every character. A person representing himself as a partner in a firm will be bound as such to persons dealing with the firm, believing him to be a member. Story on Partnerships, secs. 36, 49, 54, 64, 65; 1 Greenleaf on Evidence, sec. 207; 1 Parsons on Contracts, 145; 3 Kent's Com., side pp. 31 to 33; Richardson v. Debuys & Longer, 4 N. S. 127; Lee v. Bullard et al., 3 An. 462; Grieff & Byrnes v. Boudousquie & Fortier, 18 La. An. 631; 9 Johnston, 489; 1 Smith's Leading Cases, 981; Kell v. Nainby, 10 Barn & Creswell, 17. A person permitting his name to figure upon the books of a corporation as owner of its stock, although in fact not such owner, is held to all the responsibilities of an owner. Pullman v. Upton, 96 U. S. 328; Nat. Bk. v. Case, 99 U. S. 631. Factors and similar agents can sell as their own, property confided to them, in the same manner and with the same effect as to third persons, as though it belonged to them in fact. Delaume Bros. v. Chaffraix & Agar, lately decided. So, as more proximate to the case at bar, where a mere mortgagee held himself out as the owner of a vessel, he was held liable as such. Starr v. Knox, 2 Conn. 215; Champ- lin v. Butler, 18 Johnston, 169. So, also, where defendant allowed his name to figure as proprietor upon a cart, and the place of business to which it belonged, he was held liable for damages caused by the careless driving thereof. Stables v.

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Ely, 1 Carr & Payne (11 E. C. L. R.) 497. Such illustrations might be indefinitely multiplied, and they are and would be all based upon, and illustrative of, the same principle.

It is true that plaintiffs, dealing with Gross, despite these circumstances, might have given exclusive credit to him, and not to Gélé. In such event, not having been misled by the conduct of defendant, they could urge no complaint against him, and advance no reason for holding him liable. Were such *exclusive* credit given to Gross, considering him either as the real or known principal, as against one only apparent, or as an agent of Gélé, the recourse would be against Gross alone. *Thompson v. Davenport*, 9 B. and Cressw., 78, 88, 98; *Addison v. Gaudesequi*, 4 Taunt. 574; *Rankin v. Deforest*, 18 Barb. 143; *Story on Agency*, § 447.

In this case, however, we believe that the sales were made upon the credit of Gélé. They were so charged upon plaintiffs' books, and this, although not conclusive, is presumptive evidence of this intention or purpose on the part of the seller. *Story on Agency*, § 289. That these entries correctly designate the placing of the credit, is shown by the testimony in the case, and the circumstances thereof. The correctness of the bill sued upon is established, except six dollars worth of whisky, which plaintiffs seem to concede should be stricken off. The true balance due is, therefore, \$886 37, for which, in our opinion, there should be judgment.

Judgment reversed, and now rendered for plaintiffs for \$886 37.

Rehearing refused.

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No. 81.

JOS. B. AGNEL v. T. & J. ELLIS.

1. The authority of an agent to draw an order upon an attorney at law for the payment of the proceeds of a claim in his hands to a third person must be express and special. A general power of administration is not sufficient.
2. A mandate conceived in general terms confers only a power of administration.

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3. Powers of attorney are strictly construed, and however general in their terms, they will be restricted to the principal business of the grantor and not extended to cover particular and exceptional acts not necessarily connected with such business.
4. Such an order, not being payable in any event but depending entirely upon the contingency of collection, is not a bill of exchange or negotiable paper of any kind.
5. A party accepting a commercial draft or bill of exchange guarantees the right of the drawer to execute it, and the genuineness of the signature. In innocent hands, this guarantee extends to the question of an agent's authority where the draft is drawn by procuration. It does not, however, operate to protect the person who originally receives the paper and is so chargeable with the obligation of making due inquiry.
6. It is only in cases where commercial paper is involved that an assignee may acquire rights greater than those of his assignor. In other cases, error, fraud, forgery or extinguishment may be set up against all persons.

*Appeal from the Fourth District Court. Houston. Judge.*

*W. E. Murphy* for plaintiff.

Defendants, appellants, in person.

MCGLOIN, J.—Defendants were the attorneys at law of one John O'Rorke, residing in St. Tammany parish, in this State, and as such they were charged with the collection, by suit, of a certain claim against the Chattanooga Railroad Company. Plaintiff, claiming to be the creditor of O'Rorke, sought to have the proceeds of this suit applied to the payment of this demand, and approached defendants with that object. E. J. Ellis, one of the defendants, thereupon gave plaintiff the following memorandum :

"Let Mr. McMahon sign the name of the plaintiff, John O'Rorke, or let Mr. O'Rorke sign it. If Mr. McMahon signs the draft for J. O'R., let him sign 'per pro. C. McMahon.' Let the draft be drawn for full amount, less costs and fees. I will accept and pay the draft then from proceeds of draft in New York.

" (Signed)

E. J. ELLIS, *Atty. at Law.*"

On March 7th, 1873, plaintiffs brought to defendants a document of the following tenor :

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"NEW ORLEANS, March 7, 1873.

"*Messrs. T. & J. Ellis :*

"SIRS:—Please pay to J. B. Agnel the full amount of money in your hands from the Chattanooga Railroad Company, less fees and costs.

"(Signed)

JOHN O'RORKE.

"Per CHARLES McMAHON."

On the reverse of this paper are written the following words :

"Accepted, and to be paid so soon as funds are received.

"(Signed)

T. & J. ELLIS, *Attorneys at Law.*

"N. O., March 10, 1873."

It is shown that shortly after the execution of the above writings John O'Rorke, on hearing thereof, repudiated the transaction, claiming that McMahan had no authority to represent him as he had done, notifying defendants not to recognize said order or pay the fund sought to be affected thereby to any one but himself. This notification was, in the course of a short time, made known to plaintiff, and on April 29, 1873, he desiring to protest the document in question, defendants, to save expenses, waived protest and notice.

The questions to be by us determined are :

First—Was the execution of said document authorized by O'Rorke ?

Second—Was the document in question a draft or bill of exchange, and, if such, was the obligation of T. & J. Ellis that of acceptors, as governed by the laws and usages of commerce ?

Third—If defendants were such acceptors, are they estopped from now contesting the authority of McMahan and setting up error on their part in the transaction, if any existed ?

1st. We believe that the authority to draw such an order as the one in suit should be express and special. Defendants claim that it is a draft or bill of exchange, and, as such, within the article 2997 of the Civil Code. We shall see, further on, that the document sued upon is not paper of such character, and it must be governed by other provisions of the law than the section cited. Plaintiff contends that he has shown that

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O'Rorke had a store in the country, was old and infirm and unable to manage it, and that McMahon transacted all the business, made all the purchases therefor and all payments. His counsel argues that this general power was sufficient to cover the execution of this order, and, as it was given to cover a bill due for purchases for this business, and McMahon had authority to pay bills so contracted, that it was immaterial whether the payment was out of one fund or another, or in cash or in paper which would secure the cash. This power, if established, amounts only to a general power of administration over the commercial trade or business of O'Rorke. C. C. 2996 declares that a mandate conceived in general terms confers only a power of administration. C. C. 2997, after enumerating several objects which can only be affected by express and special powers, concludes: "And, in general, where things to be done are not merely acts of administration or such as facilitate such acts." C. C. 2996 declares, in addition to what has been stated: "If it be necessary to alienate or give a mortgage or do any other act of ownership, the power must be express." Story on Agency, sections 21, 62, 68, 69, lays down the principle that powers of attorney will be strictly construed, and that however general in their terms, they will be restricted to the principal business of one granting it and will not cover particular and exceptional matters or acts not necessarily connected with such business. For instance, a merchant, temporarily absenting himself, leaves his full power to an agent to sell and buy for him. This will be construed as extending only to purchases and sales in the line of the merchant's usual or principal business and would not authorize a sale of his furniture or household effects. This same principle has been adopted into the jurisprudence of this State. *Reynolds v. Rowley*, 4 La. An. 396; *Boykin v. O'Hara*, 6 La. An. 115; *Hartwell v. Walker*, 4 La. An. 457.

We think, under these authorities, that a general mandate, whether written or verbal, to manage a store and the general affairs therewith connected, should be confined to matters



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strictly within the current of the trade or business of said store, because such was no doubt all the principal contemplated confiding to the agent. We do not consider that a claim in the hands of an attorney and in suit is in any way necessarily connected with such trade, any more than would be the bank stock or bonds or mortgage paper of the principal, or his moneys, not constituting a portion of the capital invested in the business managed by an agent. The disposition and control of all such are acts of ownership, as contemplated by the Code, and not covered by a general power, but requiring *special* and *express* authorization.

2d. A bill of exchange is peculiar in its nature and is invested, when negotiable, as commercial paper with exceptional privileges. These privileges cannot be extended to anything which is not a commercial and negotiable instrument. The characteristics of such paper are, in the main, well defined. Amongst other things, it must be for a sum certain and payable in any event. Story on Bills of Exchange, § 46.

This order was not payable in any event, but was to come out of such sums as might be realized from the railroad company. If the company failed to pay, the paper in suit was not collectible. Therefore, its payment was dependant upon a condition and was not due in any event, and it was not a commercial draft or bill of exchange.

3d. A party accepting a commercial, negotiable draft or bill of exchange, guarantees the authority of the drawer to execute the same, and the genuineness of his signature. This principle has been held applicable to such an instrument drawn by an agent, and the authority of the agent declared to be amongst the things guaranteed by the acceptance. *Robinson v. Yarrow*, 7 Taunton, 445. There is really no reason why, in the hands of an innocent holder, the guarantee should not extend so far. But as one who received a draft from a forger with notice, actual or legal, could not impose such guarantee upon the acceptor, and as one dealing with an agent must, at his peril, inquire into the scope of that agent's authority, and

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is negligent if he do not, it is reasonable to hold a person taking a draft, executed by a mandatary, as charged with knowledge as to the character and extent of the agency, and not protected by the acceptance, as an innocent person would be. And in view of this obligation upon the part of persons dealing primarily and directly with agents, the drawer has as much right, and perhaps more, to presume that the payee has performed his prior duty, and ascertained the extent of the agent's power before taking his draft, as the negligent payee has to suppose that the acceptor would not commit himself unless the draft were correct.

At all events, this enforced guarantee, peremptorily debarring the acceptor upon commercial paper from setting up error, fraud, forgery, or other similar defenses, is in derogation of the general law, existing only in favor of commerce. Where the contract is not in the shape of commercial paper, it is open to attack and rescission for error, violence, fraud or menace, or illegality, or absence, or failure of consideration, under our Civil Code. C. C., Arts. 1881, 1893, 1819, 1824, 1846, 1847, 1850.

If, therefore, defendants accepted this order in error, as we believe they did, we stand face to face with express provisions of law, which accord them the right to be relieved, and we must be governed thereby. Civil Code, Arts. 1821, 1881.

It has been suggested that this cause should be remanded to be proceeded with after making the heirs of O'Rorke, now dead, parties. We see no useful purpose to be subserved by such a course, as it is not suggested, nor does it appear that plaintiff can hereafter present stronger evidence of McMahon's authority than has been brought up in this record. If O'Rorke owed him upon the original bill, plaintiff's remedy is not affected by this decree.

Judgment reversed.

Rehearing refused.

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Grabfelder & Co. vs. Navra.

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No. 78.

A. L. GRABFELDER &amp; CO. v. M. L. NAVRA.

1. Where no error of law or evidence is complained of, or suggested, or appears in the record, the appeal will be held frivolous, and damages inflicted.
2. One who pretends that a claim is canceled, or in any manner extinguished, must set up these defenses in his answer.
3. Failure to file an answer, or employ counsel, or to otherwise properly defend a suit, is no ground for a new trial.

*Appeal from Third District Court. Monroe, Judge.**Braughn, Buck & Dinkelspeil* for plaintiffs.*A. B. Philips* for defendant.

ROGERS, J.—The defendant having been condemned by a judgment to pay to plaintiffs the sum of \$555 56, with interest from June 2d, 1879, has taken this appeal. He was regularly cited to answer the petition in the lower court; failed to answer, and, in default, the judgment was obtained. He applied for a new trial on the grounds :

“First. The judgment was contrary to the law and the evidence.

Second. That defendant was security on a bond which was canceled by plaintiff, and that plaintiff is in the act of obtaining judgment.

Third. That counsel has just been employed in this case, and could not file any answer.”

The new trial was properly refused. The error in law and evidence complained of is not suggested, and none appears in the record. If the claim upon which suit was based had been canceled, or in any manner extinguished, it should have been set up in a defense to the action. A failure to file an answer, and to properly defend a suit, or employ counsel in season, are no grounds for a new trial.

The appeal was evidently taken for delay, and is frivolous.

Judgment affirmed, with ten per cent damages for frivolous appeal.

Rehearing refused.

No. 75.

## MR. AND MRS. JOSEPH AZEMARD v. SUCCESSION OF JULES CAMPO.

1. It is incumbent upon a party appearing in a fiduciary capacity as appellant to prove his alleged fiduciary capacity in the lower court when he moved for an appeal.
2. Where it is made to appear to this Court that the record is not complete, and the certificate of the clerk untrue, a *certiorari* will issue to the lower court for a statement as to what witnesses were examined, and what testimony was offered on the trial, and upon the return to said writ, if it appears that all the evidence, pleadings and facts upon which the District Judge decided the case have not been sent to this Court, the appeal will be dismissed.

*Appeal from the Second District Court. Tissot, Judge.*

*Guy Duplantier* for the motion.

*A. J. Villeré* contra.

## ON MOTION TO DISMISS.

MCGLOIN, J.—We are asked to dismiss this appeal.

First—Because there is no evidence in the transcript or record of appeal herein filed to show that Henry B. Campo, who claims the right to make this appeal as the administrator of the succession of the late Jules Campo, was ever appointed to the fiduciary trust, and has the right or capacity either in law or in fact to appeal this case on behalf of said succession.

Second—Because it was incumbent upon the said Henry B. Campo to prove his alleged fiduciary capacity in the lower court when he moved for his appeal, and hence he cannot now be allowed to show his right to a standing in judgment before this Court for the succession of which he claims to be the administrator.

Third—Because the documentary evidence produced by the plaintiffs, as well as the testimony of the two witnesses, Laurent Auguste and Joseph Decondreau, who testified on

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Asemard vs. Succession of Campo.

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behalf of the said plaintiffs in the lower court on the trial of the cause, are not contained in the transcript or record of appeal herein filed by appellant.

Fourth—Because this Court cannot revise this case without all the evidence upon which the judge of the lower court predicated his judgment from which the appeal has been taken.

There is no evidence in the record that Henry B. Campo was ever administrator of the succession of Campo. It appears that the widow, Jules Campo, was administratrix, against whom the present judgment was rendered. There is no evidence that this person has ever been superseded.

Evidence of his authority should have been furnished in the lower court when the application for an appeal was made, and should appear in the transcript of appeal. 2 An. 902, 879; 6 An. 529; 10 An. 703.

The law contemplates three modes of bringing up an appeal on the facts: 1st, by a record of the evidence taken down by the clerk when the case is tried before the lower court; 2d, by a statement agreed upon by the parties; 3d, by a statement of facts to be made by the judge, C. P. 601, 602, 603, and as to the law, by bill of exception or assignment of errors on the face of the papers.

In the return to the *certiorari* herein issued, it appears that on the trial of the case in the lower court two witnesses, Laurent Auguste and Joseph Decondreau, testified in open court that their testimony was not reduced to writing; that certain documentary evidence was offered in evidence. None of this appears in the transcript; there is no statement agreed upon the parties—no statement of facts prepared by the judge.

We cannot pass upon the merits of a cause unless we have before us the evidence, pleadings and facts upon which the District Judge predicated his judgment. *Laura Grivot vs. Rufus Waples*, and *Schneider vs. Kennair*, recently decided by us.

Appeal dismissed.

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Bourke vs. Perry et al.

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## No. 18.

PATRICK BOURKE v. E. WOOD PERRY et al.

1. Where parties purchase from a common vendor, who has laid out in the rear an alley common to them all, but by their titles their lots run back only to such alley, they receive no right, except that of use to the land taken up thereby.
2. A mutual agreement, whereby all the parties owning such lots discontinued the use of such alley, does not vest in the contractants the title to the ground itself, upon which such alley was laid out.
3. The parties, however, to such an agreement, will not be heard complaining thereof, and demanding the reopening of the alley.
4. Where, in such an agreement, a person appears as agent of the owners of one of the lots, and immediately thereafter the portion of said alley, to the rear of said lot, is taken into its inclosure, and sheds, forming a part of the premises, are built thereon, it will be presumed that such appearer was, in fact, an agent.
5. Where the present plaintiff purchased this lot, and went into, and retained for years possession thereof, with its portion of the alley inclosed and built upon as stated, he is estopped from demanding the reopening of the alley.
6. Parties will not be heard complaining of wrongs to which they have been themselves participators.

*Appeal from Fifth District Court. Cullom, Judge.*

*W. H. Rogers and Wynne Rogers for plaintiff, appellant.*

*Jas. H. Grover and John M. Bonner for defendants.*

John H. Kennard, Esq., member of the Bar, judge *ad hoc* in this case, vice Rogers, judge, recused, having been of counsel therein, concurred in the opinion and decree of the Court.

McGLOIN, J.—Plaintiff sues defendants to compel the reopening of what he claims is an alley in common to his property, and that belonging to them, unlawfully closed by them, and for damages. It seems that all of these lots originally belonged to one J. P. Kirwan, who laid out in their rear an alley, five feet wide, by means of which access could be had by the occupants of each lot to Gravier street. Kirwan becoming insolvent, this property was sold

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*Bourke vs. Perry et al.*

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by order of court to the parties engaged in this litigation, or their predecessors. In each of these acts, the lots disposed of are described as bounded upon the rear by this alley, the use of which is reserved to all of said lots or their owners. Sometime afterwards, and before the date of the act we are next about to mention, the City of New Orleans, for the purpose of opening up Claiborne street, appropriated a large portion of the front of each of these lots, leaving of the one claimed by plaintiff only a right-angled triangle, 26 feet, 8 inches, 7 lines, by 11 feet, 3 inches.

Upon the 15th day of April, 1861, the various defendants in this suit, or their predecessors, with one Andrew Parle, appearing to represent the lot now claimed by plaintiff, appeared before a notary, and agreed to discontinue the use of said strip in the rear as a common alley, and to add to each lot the portion of said alley which lay immediately to its rear.

It would seem to us that the right of these parties to do this was very questionable, because they had acquired from the insolvent estate of Kirwan no title to the soil of this alley; but, on the contrary, by the express terms of their titles, their ground was permitted to run back only to this alley, and no farther. All that they had contracted for, or received, was the right to use this strip of ground for purposes of having access from Gravier street to the rear of their properties.

What effect the abandonment of this right of use, resulting from the Act of April 15, 1861, has had upon the absolute ownership of this strip, it is not our province here to determine; but we are called upon to say, that in our opinion, its partition by these parties was, according to the showing of this record, entirely unwarranted.

If, however, Andrew Parle really represented the lot now claimed by plaintiff, either as owner or representative of the owner, in default of complaint upon the part of those who might be entitled to claim the ownership of the strip, we

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*Bourke vs. Perry et al.*

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would not be at liberty, as between these parties, to disturb the arrangement.

There are several questions raised in this case upon the admissibility of evidence and the legal effect thereof, the determination of which is, under the view adopted by this Court, unnecessary.

We do not consider the ownership of Parle as established, nor is there any direct proof of his agency in the premises. The evidence, however, establishes the fact that immediately after the passage of the Act of 15th April, 1861, all of said lots, including that claimed by plaintiff, were extended backwards, so as to inclose their proportions of this strip. This lasted up to the time of the filing of this suit, March 11, 1873, and was still the state of affairs when the witnesses testified upon the trial of the cause, January 16, 1874. For five years preceding this last date, a carpenter shop, constituting a part of the premises, within the plaintiff's inclosure, was actually resting upon a portion of this common alley.

Plaintiff's title, as offered, was executed March 28th, 1870, so, therefore, this carpenter shop was upon the premises then, and constituted part of his acquisition. So far as appears to the contrary, it is still remaining as an obstruction to the alley.

Besides so purchasing the property as extended, he had been at the time of trial, for years, and was then, himself in the enjoyment of all the advantages of the act of April 15th, 1861, as had been his predecessors, ever since the execution of that act, and he and they have been, with defendants, guilty of obstructing the free use of the alley.

We cannot listen to a person who complains of a wrong in the perpetration or continuance whereof he has participated; nor would it be proper, under any circumstances, to accord plaintiff any relief in the way of compelling defendants to clear away their obstructions in his interest, when he has not himself removed his own, and tendered to his neighbors that portion which he demands of them.



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Montegut vs. Waggaman et al.

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Farthermore, even were Parle originally without authority to represent, in the Act of April 15th, 1861, the owners of that lot, they were at liberty, by subsequent ratification, to adopt or confirm what he had done, in which event they would become bound as fully as though original authority had existed. Availing themselves of the terms of this convention, joining with their neighbors in the actual division of the strip, was a ratification of the strongest character, if, indeed, it does not, by presumption or as circumstantial evidence, go to prove original authorization. Bringing the same principle more immediately home to plaintiff, individually, his taking and long use of this shed, and of the ground in question, constitutes a personal ratification, even if he were not bound by that of his predecessors.

Judgment affirmed.

NO. 46.

PIERRE MONTEGUT *v.* EUGENE WAGGAMAN *et al.*

1. Sheriffs and their deputies, as public officers, owe to the community the strictest impartiality, and to favor one litigant at the expense of another, is, upon their part, a violation of duty.
2. Neither sheriff nor deputy sheriff, has the right to undertake to watch over or protect the rights or interests of particular persons to the prejudice of others, in matters connected with or pertaining to their official duties.
3. They cannot, to the detriment of persons demanding their services, make public information coming to their knowledge officially, or by reason, or in consequence of their official character.
4. It is the duty of such officers to strive to render effective the mandates and writs of the courts, whose executive officers they are.
5. They must respond to the exigency of the writs they hold, exercising in connection with each the degree of care and diligence necessary to make it effective.
6. Where a plaintiff shows that his recourse upon property seized under his writ has been lost by the negligence or misconduct of a sheriff, and proves the value thereof, the burden rests upon such officer to justify or legally excuse his conduct.

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7. If the value of the property so lost exceeds the amount of the judgment and costs, the aggregate of the latter is the measure of damage.
8. If the value of such property does not equal the amount of the writ, such value becomes itself the measure of the damage.
9. Where, however, the sheriff holds under the writ, after the loss or release of particular property, sufficient to satisfy the claim, and the plaintiff subsequently releases such remaining property, he cannot recover for the preceding negligence or misconduct. It is a case of contribution to his own loss.
10. Presumptions which change the burden of proof cease to have such effect when their own force is broken or materially impaired.

*Appeal from the Fifth District Court. Rogers, Judge.*

*Charles Louque* for plaintiff, appellant.

*T. & J. Ellis* for defendant.

Thomas Gillmore, Esq., attorney at law, sat in this cause as judge *ad hoc*, vice Rogers, judge, recused, having decided the case in the first instance, and concurred in the opinion and decree.

MCGLOIN, J.—Defendant, Eugene Waggaman, late civil sheriff of this parish, and his sureties, are sued *in solid*, for damages resulting from alleged malfeasance and neglect upon the part of certain deputies of said sheriff. Plaintiff, as subrogee of a monied judgment, issued execution against his debtor, and directed the sheriff to seize two judgments in his favor, one for \$500, against R. H. Woods, and the other for \$562, against Edwin Bonnet. These two judgments were specially pointed out for seizure by written order of plaintiff's counsel, delivered to the sheriff with the writ. There seems to have been no difficulty in the matter of the Bonnet judgment, but that against Woods had been some time before assigned to a party named Aufenkolk, but notice of subrogation had not been served upon the defendant. Plaintiff's counsel testifies, and he is not contradicted, that when he delivered his instructions for the seizure of the Woods judgment, the chief deputy in the office of the sheriff, told him that the judgment in question had been transferred, and, so far as he believed, in good faith, and that

he was loth to serve a notice of seizure which would defeat the transfer. This was upon 20th or 21st of the month of August, 1876. At that time there was no notice of the subrogation to Aufenkolk in the hands of the sheriff. It seems, however, that another deputy sheriff had promised the counsel for Aufenkolk to watch over his interest and to let him know if anything should transpire threatening the same. Accordingly, when these instructions were received, this deputy last referred to, notified the counsel of Aufenkolk, and, at his instance, repaired to the clerk's office of the court which had ordered the subrogation and secured a copy of the order for service, and then simultaneously served the notices of seizure and subrogation. Instead of making return of this fact, his certificates recited the service of the subrogation as having been made upon August 22d, which was the true date of both services, and that of the seizure as upon the 23d of August, which was false. It is true, that in his testimony this deputy claims that this was the result of error, but this statement we are not disposed to credit. A litigation arose between the seizing creditor and the subrogee, which, by reason of this false return, resulted in favor of the latter.

The plaintiff, in his petition, complaining of these acts of omission and commission on the part of the sheriff, through his deputies, except that of the false return, which was not known to him until elicited upon the trial of this cause, sues for damages, fixing as the amount of his injury the sum called for by his judgment and writ.

We consider that the facts proven in this case establish against the deputies implicated, and for whom defendant, Waggaman, is responsible, a case of favoritism and misconduct amounting to fraud. Sheriffs and other such public officers are servants of the whole people, and owe to the community the strictest impartiality. To favor one individual at the expense of another is a flagrant violation of duty and a piece of rank injustice.

Especially reprehensible is such conduct upon the part of

those who execute the mandates of the courts, from whom justice and impartiality are pre-eminently expected, and whose process should be pure, in every respect, from inception to final determination.

In this case, the chief deputy had no right to harbor or express any regret, when called upon by plaintiff, to perform a duty pertaining to the office, for to him all persons should stand alike. The other deputy had no right to thus undertake the protection of the interests of any particular litigant. He was guilty of gross wrong when he communicated a fact coming to his knowledge officially, or by reason of his connection with the sheriff's office, from one party to another, to the detriment of the former. Still more flagrantly improper and unjust was it for him, personally, to secure the issuance of other process destructive of that which he was already charged to serve. The false return, whether made intentionally or through negligence, was a fitting climax to the preceding wrongs.

A sheriff must, in all cases, respond to the exigencies of the writ he holds. Where nothing special exists prohibiting it, he may, within reasonable bounds, consult his own convenience. When, however, the circumstances of the case require, he must exercise extraordinary diligence, even though inconvenient or laborious to himself. Here the knowledge that the sheriff possessed of the existence of dormant rights in others, more negligent than plaintiff, was sufficient to impose upon him the duty of using such extraordinary diligence; for his obligation is not simply and alone to execute the orders of the court. He is bound as well to strive to render them effective. In this case, the time consumed by this deputy in notifying the counsel for the subrogee and taking out the rival process should have been devoted to the service of that which he already held.

It is well settled that a transfer, such as the one to Aufenkolk, has no effect as to third persons before the debtor is notified. Until such notice, the judgment was open to plaintiff for seizure, and his superior diligence should not have been unlawfully defeated. We consider this proof as legally sufficient to

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establish the fact that plaintiff's recourse upon this judgment was lost by the misconduct of those for whom the sheriff is responsible.

In cases where a plaintiff establishes the omission or wrongful act of a sheriff, whereby recourse is lost upon particular property, and the value thereof is shown, the burden of proof is shifted upon the officer. The damage is presumed to be the amount of the judgment, interest and costs, if the value of the property equals or exceeds their aggregate, and if not, then such value becomes itself the measure of damage. Sedgwick on the Measure of Damages, page 634 (side p. 508) and cases cited in note No. 2; *Ib.* p. 637; *Humphrey v. Hathorne*, 24 Barb. 278; *Carpenter v. Dooly*, 1 Hill, 465; *Commonwealth v. Porter*, 18 Penn. St. 439; *Ransom v. Halcott*, 18 Barb. 56. Such is also the doctrine in this State, as appears from *Gates v. Bell*, 3 La. An. 62; *Wilkins v. Bobo*, 13 La. An. 430; *Davis v. Barham*, 10 La. An. 528.

In the following cases, although this rule is not announced, it has been practically applied, in as much as judgments have been rendered against sheriffs and their sureties, upon proof such as is thereby contemplated and held sufficient. *Semple v. Buhler*, 6 Martin, N. S. 471; *Lacy v. Buhler*, 8 Martin, N. S. 661; *Fernandez v. McVittie*, 2 Rob. 239; *Magee v. Robbins*, 2 La. An. 411; *Overton v. Ricord*, 2 La. An. 805; *Sandidge v. Jones*, 2 La. An. 933; *Byrne & Co. vs. Anderson*, 8 La. An. 139; *Lynch & Co. v. Leckie*, 9 La. An. 506; *Dunlap v. Freret*, 10 La. An. 83.

While, however, the general rule is that a plaintiff, showing the wrong done by the sheriff, and the loss thereby of recourse upon particular property, need not prove that defendant has no other property out of which his claim may be satisfied, yet we are forced reluctantly to the conclusion that the case at bar must be excluded from its operation. The seizure in this instance was directed against two separate judgments, either of which were in amount sufficient to satisfy the writ. One of these was properly levied upon, and there is nothing to show

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that it was not worth its face. After the laches or misconduct of the sheriff had caused the loss of recourse upon the other, and these facts were known to plaintiff, he voluntarily, and in writing, ordered the release of the seizure upon the one actually reached.

So far as the record goes, there is nothing to explain this course upon his part, or to show that this judgment was unavailable either in whole or for any portion.

We consider this action of plaintiff as in the nature of contributory negligence, and cannot permit him voluntarily to place himself in a way to lose his money, and then demand of the sheriff to make it good. We are not prepared to lay down the doctrine that where a plaintiff has property seized, far exceeding what is necessary to satisfy his claim, and a sheriff either intentionally, with good or bad motives, or through negligence, releases a portion thereof, leaving enough to satisfy the writ, that the plaintiff can release or take what remains out of his hands, and hold him responsible by reason of the preceding wrong. When such a state of facts exists, we consider that, as in other cases of apparent contribution, the burden shifted to plaintiff, who should have shown that what he has done seemingly of a contributory nature was not such in truth.

Furthermore, the sheriff was liable for nothing but actual damage proven or presumed, and where, as in this case, the presumption is impaired and its force broken, it can serve no longer in the stead of positive evidence, and the party must make his proof.

From the nature of this case, as above stated, we consider it one essentially calling for the exercise of that equitable discretion which rests with us, to leave the issues open for further efforts upon the part of plaintiff to right the wrong inflicted, if he can establish that his release of the second judgment in no manner contributed to his loss.

Judgment of nonsuit.

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Dewar vs. Beirne & Co.

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No. 63.

JOHN DEWAR v. J. B. BEIRNE &amp; CO.

1. Where a party is employed in a particular capacity, the fact that he occasionally renders services of a higher order, or different character, does not change the prescription applicable.
2. Where a laborer is employed by the day or week, the amounts due him for several of such periods, do not, ordinarily, merge into a single obligation, but are distinct and different obligations, each separately prescriptible in one year.
3. Therefore, even if the prescription of such claims can be at all interrupted by partial payments, the payment of what is due, for a particular number of days or weeks, does not interrupt prescription as to that which is due for others.
4. Where such payments are made, and are not imputed by the parties to the indebtedness for any particular period, they will be imputed to the extinguishment of those which are oldest. C. C. 2166.
5. The entries or memoranda made by defendants, or their employees, upon their pay rolls, do not constitute an acknowledgment such as interrupts prescription, under C. C. 3535.
6. Where the appellant profits by his appeal, he is entitled to the costs thereof. C. P. 908.
7. This Court, granting a rehearing, will not set the cause down again for trial, where the error to be corrected lies merely in the distribution of costs, or is otherwise immaterial.

*Appeal from Fifth District Court. Rogers, Judge.*

*Richard DeGray* for plaintiff.

*W. S. Benedict* and *F. W. Baker* for defendants, appellants.

Chas. A. Conrad, Esq., judge *ad hoc*, vice Rogers, judge, who decided this case in the first instance, recused, delivered the opinion and decree in this case.

CONRAD, Judge *ad hoc*.—Plaintiff sues W. J. Beirne, J. W. Demarest, and James A. Vigneaud, alleged to be partners, constituting the firm of W. J. Beirne & Co., and the firm itself, claiming \$704 80, balance due for wages as “*day watchman or utility man*,” from September 1st, 1876, to October 16, 1878, 664 days,

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at the rate of \$1 50 per day, and from W. J. Beirne, *individually*, the further sum of \$25, collected for plaintiff's account.

Defendants answer separately, each by general denial, and by special denial, that he was a member of, or connected with, any such firm.

Upon trial before this Court, the indebtedness of W. J. Beirne, for the \$25, alleged to have been collected by him, was admitted, leaving for our decision only the question of the respective liabilities of defendants for the amount claimed as compensation for plaintiff's services or wages.

The testimony of Landry, J. P. Dewar and of Demarest, we think, establishes satisfactorily the facts of the employment of plaintiff in the capacity alleged, that he was promised payment at the rate of \$1 50 per day, *at least* from September 1st, 1876, to July 1st, 1878, and at the rate of \$1 per day thereafter, until October 16, 1878; and there is no claim that he has been paid more than the sum for which he gives credit.

The petition, the annexed account, and the testimony introduced, show the character of the duties which plaintiff was employed to perform; and the character of this employment, and the contact into which he entered, cannot be changed by showing that he was, on occasions, requested, or volunteered to render services of a higher order, or which usually receive higher compensation.

We think the character of his employment clearly such as are embraced in Arts. 3534 and 3535 Civil Code.

Whether the prescription of claims of workmen, laborers or servants, for their wages, can be interrupted by payments on account, we are not in this case called upon to determine. It is sufficient to say that the payments made to plaintiff in this case did not operate such an interruption. Plaintiff was employed for service by the day, and the amount due to him was not *one* obligation, but an accumulation or aggregation of obligations maturing from day to day, as each day's service was rendered, and the indebtedness for the service of each day constituted a separate and distinct obligation, prescribable when



one year from the date upon which it had been earned had elapsed. The payment, therefore, of any number of such obligations, could not have the effect of interruption of the prescription of others which preceded or followed.

The payments credited upon plaintiffs' account, therefore, not having been imputed by defendants to any obligations specially, should be imputed to those which, at the dates upon which they were made, had been longest due. Civil Code, Art. 2166. And the plea of prescription is maintained against so much of the indebtedness for wages as accrued more than one year prior to service of citation. This prescription was not prevented, interrupted or suspended by the weekly entry of plaintiff's name, and the amount due to him for the week's service upon defendants' pay roll. Pay rolls are neither in form nor intention evidences of indebtedness from debtor to creditor. They are mere memoranda from one person to another, to guide the latter in the payment of employees, and not accounts of any character, certainly not "accounts acknowledged," provided for in C. C. Art. 3535.

The testimony introduced shows that J. W. Demarest was only associated with Beirne in the cooperage business after June 3d, 1878, before which time plaintiff's employment had been changed to the saw-mill, with which Demarest was at no time connected.

The connection between Vigneaud and Beirne, whatever it may have been, finally terminated in February, 1878, more than one year prior to the service of citation upon him.

If, therefore, plaintiff at any time had any claim against Vigneaud, that is also prescribed.

Judgment for plaintiff, and against defendant, W. J. Beirne, for the amount due for wages from March 1st, 1878, to June 30th, 1878, at the rate of \$1 50 per day, and from July 1st, 1878, to October 16th, 1878, at the rate of \$1 per day, and for the further sum of \$25, admitted by said J. W. Beirne to have been received by him for plaintiff's account, with legal interest

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upon said amounts from judicial demand, until payment and all costs of this suit.

Suit dismissed as to Jas. A. Vigneaud and J. W. Demarest.

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ON REHEARING.

MCGLOIN, J.—Defendants, upon application for rehearing, call to our attention the fact that the judgment of this tribunal is more favorable to them than that appealed from. They claim that, having succeeded in modifying the decree to their advantage, they are entitled to costs of appeal. C. P. Art. 908.

We find, upon a re-examination, that this position is well taken. The error should be corrected. As, however, there is no other complaint advanced, and as the matter involves merely a question of calculation, we see no reason for placing the cause, when reopened, upon the docket, thereby delaying, without advantage, the termination and finality of the litigation.

A rehearing upon said question is, therefore, granted; and proceeding to adjudge the matter as should have been originally done, it is ordered that there be now judgment in all respects like that first given, except that plaintiff and appellee pay the costs of appeal.

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No 8.

## ALFRED KEEN v. S. S. CARLISLE.

1. Art. 890 C. P. must be considered in connection with Arts. 592 and 888 C. P. It is when appellee has cause to complain of the *judgment appealed* from that he may ask, in answer filed in appellate court, either for a reversal or affirmance of the judgment brought up. He cannot, without appealing from a judgment dismissing his demand in reconvention, have that judgment reviewed by the Appellate Court.
2. Where the issue presented by the pleadings is one of nuisance *vel non*, with a claim for damages fixed at five hundred dollars, and no contest involving the ownership of property, or the right to its enjoyment, the jurisdiction of the Court will be determined by the amount claimed.

*Appeal from the Fourth District Court. Houston, Judge.*

*J. H. Ferguson* for plaintiff and appellant.

*J. O. Nixon, Jr.*, for appellee.

The opinion and decree in this case were concurred in by James McConnell, Esq., judge *ad hoc*, vice McGloin, judge, refused, having been of counsel.

ROGERS, J.—Plaintiff sues to recover five hundred dollars as damages sustained by the erection, with a desire to injure him, of a fence or barricade, unsightly, offensive and injurious, obstructing the view, and shutting out light and air, and an intolerable nuisance. He also prays that this barricade be removed.

The answer is a general denial—a claim for \$1250 in reconvention. The case was tried by a jury; and from a judgment dismissing plaintiff's action, and the claim in reconvention by defendant, plaintiff alone appeals. Defendant has filed in the Appellate Court an answer to the appeal, praying that the judgment be amended, so as to condemn plaintiff and appellant to pay him the amount of his demand in reconvention—\$1250—and cites C. P. 890, and *Bludworth v. Hunter et al.*, 9 Rob. 256. The authority is not applicable to the case at bar, and Art. C. P. 890 must be considered with Arts. 592 and 888 C. P. It is when the appellee has cause to complain of the *judgment appealed from* that he may ask, in answer filed in the Appellate Court, either for a reversal or affirmance of the judgment appealed from. He cannot, without appealing from a judgment dismissing his demand in reconvention, have that judgment reviewed by the Appellate Court. *Girod v. His Creditors*, 2 An. 546; *Westerman v. Street*, 21 An. 714.

The judgment dismissing the claim of defendant is, therefore, not before us.

There is no contest before us as to the right concerning the ownership of property, and its enjoyment, to erect this barricade, as was the case disclosed in *State ex rel. D'Arcy v.*

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Barthe vs. City of New Orleans.

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Judge Fourth District Court, 25 An. p. 621, and *Parle v. D'Arcy*, 28 An. p. 424. The question is one of nuisance *vel non*, for its abatement and damages, placed by plaintiff at the sum of five hundred dollars.

The jury found that there was no nuisance, and that no damage had been sustained. This disposed of the entire matter at issue between the parties, and, as to all those issues, constitutes *res adjudicata*.

This cause was finally determined in July, 1877, and an appeal taken to the Supreme Court; that tribunal has referred it to this Court, holding that the only apparent amount in controversy is the sum of \$500. This is also our view. We have held in *Martin Williams v. Hayes*, recently decided by us, that under the Constitution of 1879 this Court was without jurisdiction in cases involving five hundred dollars, decided and final, prior to August 1st, 1880. Our opinion has been recently approved by the Supreme Court of the State in *State ex rel. McGehee, Snowden & Violet v. Judges*, just decided.

The appeal herein is, therefore, dismissed.

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No. 98.

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BERNARD BARTHE v. CITY OF NEW ORLEANS.

1. Where an appeal is taken from an alleged order authorizing the bonding of an injunction, and no such order appears in the record, an appeal will be dismissed.
2. The appearance in the record simply of a motion to bond, without any endorsement or order of the judge *a quo*, or any minute entry showing that the motion was granted, is not sufficient.

*Appeal from Sixth District Court. Rightor, Judge.*

*Albert Voorhies* for plaintiff and appellant.

*C. F. Buck* and *Wynne Rogers* for the city.

ROGERS, J.—By reference to the assignment of errors filed by appellant, we are asked to set aside, as illegal, an order permitting the defendant to bond a writ of injunction. We do not

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find any such order in the proceedings; we granted plaintiff a *certiorari*, and he has filed the record. We find a motion to bond made by the City Attorney on January 22d, 1880, but no order endorsed thereon or signed by the judge; no minute entry appears to have been made since May 22d, 1878.

We cannot afford relief where, by the record, none appears necessary.

The appeal is, therefore, dismissed.

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No. 102.

GABRIEL SCHWARTZ v. FRANK HUER.

1. Act No. 7, extra session of 1875, prohibiting sale of property for taxes during a certain period, did not affect sales made before its passage.
2. An action for damages for slander of title is not in the nature of a petitory action, and the plaintiff in such a suit does not assume the burden of proof.
3. Where the defendant in such a suit sets up title by way of reconvention, and asks to have it recognized, his demand is petitory in its nature, and the burden of proof is upon him.
4. A tax-title will not be enforced or maintained unless it affirmatively appear that all the legal formalities have been observed.
5. Where the description of the property sold is not sufficient to enable the public to know what property was to be sold, the sale is void.

*Appeal from the Fifth District Court. Rogers, Judge.*

*Hornor & Benedict* and *F. W. Baker* for plaintiff.

*Buck & Dinkelspeil* for defendant, appellant.

The opinion of the Court was delivered by Frank N. Butler, Esq., judge *ad hoc*, vice Rogers, judge, recused, having decided the case in the lower court.

BUTLER, Judge *ad hoc*.—Gabriel Schwartz, claiming to be the owner of a certain piece of real estate, and averring undisputed possession for five years previous to the institution of this suit, contends that defendant, Huer, illegally and maliciously slanders his title by claiming, under a pretended act

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of sale made to him by A. S. Badger, State Tax Collector, on the 24th of August, 1876, wherein said Badger conveyed the title which the State of Louisiana claimed to have acquired by purchase at public auction from J. W. Fairfax, State Tax Collector, on the 24th of March, 1875. For the many reasons assigned in the petition, Schwartz asked for judgment, decreeing him to be the owner of the property, also declaring defendant's title null and void, and finally ordering the Recorder of Conveyances to cancel and erase from the records of his office the inscription of defendant's title, with one hundred dollars damages and costs.

The answer urges the validity of the tax-title, and sets up several grounds tending to show such a want of title in plaintiff, that, from its own weakness, it is wholly insufficient to enable plaintiff to recover. Then, assuming the character of plaintiff in reconvention, defendant asks for a "judgment recognizing him as the sole and legal owner of the property in controversy; and, if that relief be refused, that his title be recognized subject to plaintiff's right of redemption."

The lower court gave plaintiff judgment, decreeing defendant's title null and void, ordering its erasure from the conveyance records, and requiring plaintiff to restore to defendant \$83 66, the amount of the taxes for which the property was sold, defendant to pay all costs. From that judgment defendant has appealed.

The only point presented in the brief of counsel for the plaintiff for our consideration is that defendant's title is an absolute nullity, the same having been acquired under a tax collector's sale made at a time when the law prohibited the making of such sales, viz: in violation of the provisions of Act 7 of the extra session of 1875.

To sustain this position counsel have referred us to *Workmen's Bank v. Lannes*, 30 An. 871.

In the case submitted for our decision we find that the property in controversy was acquired by the State of Louisiana at public sale, held under the direction of the State tax

collector for the Fourth District, City of New Orleans, *on the 24th day of March, 1875*. On turning to the Acts of 1875 we find that Act No. 7 of the extra session of that year was not adopted *until the 8th of May, 1875*. We cannot, therefore, understand how Act No. 7 of the extra session of 1875, which was passed on the 8th of May, 1875, could possibly prohibit the State tax collector from making a sale on the 24th of March, 1875—a month and a half previous to the adoption of that statute. No law may be construed so as to have a retro-active effect. C. C. Art. 8; State Constitution of 1868, Art. 110. *Workingmen's Bank v. Lannes*, 30 An. 871, does not apply. The facts of that case show that the Court had under consideration the validity of a tax collector's sale made in August, 1875—a sale effected several months *after* the passage of Act 7 of the extra session of that year. That decision unquestionably declares that by the provisions of Act 7 of the extra session of 1875 tax collectors throughout the State are prohibited from selling property for delinquent taxes in the year 1875 from and *after* the adoption of that act; but it does not say that tax collectors' sales made *prior* to the passage of that statute are null and void.

We are satisfied that no law was in force on the 24th of March, 1875, which prohibited the tax collector from making the sale in controversy; and, if the sale is void, it must be so for some other reason.

Before considering any of the many other reasons assigned in plaintiff's petition for the nullity of defendant's tax-title, we have endeavored to ascertain the true character of the present action, for the purpose of determining upon whom rests the burden of proof.

Defendant's counsel contend that plaintiff's suit is in the nature of a petitory action, and, being such, he can recover only on proving a superior title vested in him, and that he can have no relief by reason of any defect in defendant's title.

Art. 43 C. P. says: "The petitory action, or one by which real property, or any immovable right to such property may

be subjected to is claimed, *must be brought against the person who is in the actual possession of the immovable,*" and in that action the plaintiff *must make out his title*, otherwise the possessor, whoever he be, shall be discharged from the demand. C. P. Art. 44.

We have carefully analyzed plaintiff's petition, and are satisfied that it is destitute of at least *one* of the essential elements necessary to constitute the petitory action. It not only fails to allege that defendant is in the actual possession of the property in dispute, but, on the contrary, it particularly and expressly avers plaintiff's uninterrupted possession for *five* years preceding the institution of the suit.

Defendant has reconvened, and asked that the property be adjudged to him. This reconventional demand, or cross action, wherein defendant sets up title in himself, and sues plaintiff, the actual possessor, by virtue of his, defendant's, tax-title, is clearly petitory, and, under Article 44 of the Code of Practice, imposes on defendant the obligation of making the proof requisite to sustain his demand. The case of *Millaudon et al. v. McDonough*, 18 La. 107, is instructive, and determines both the character of this action and the party upon whom the burden of proof lies. The Court said: "The first question is upon which party lies the burden of proof as to the title of the land. The defendant says it rests upon his adversaries and their warrantor. We think differently. The reasons given by the district judge in his judgment have not been refuted, and are, in our opinion, unanswerable. He says the demand of the plaintiffs in their original petition does not constitute a petitory action. It is destitute of the first requisite of that action, not being brought against a party alleged to be in possession. C. P. Art. 43. On the contrary, the plaintiffs allege they are in possession. \* \* \* It is true the defendant says he is in possession also, and, had he rested his case upon that allegation, it is possible the question would have been limited to that inquiry, according to Article 49 of the Code of Practice. But the defendant has gone further, without excepting to the



form of action. He comes up to the mark, sets up title in himself, and institutes a reconventional demand, asking that the property be adjudged to him. This reconventional demand, or cross-action, which is by the Code of Practice consolidated with the principal, or original suit, is clearly petitory, and imposes on McDonough the obligation of making the proof requisite to sustain his demand."

We have carefully considered the cases cited by counsel for defendant, from 12 Ann. 5, and 13 Ann. 235, neither of which, in our opinion, controvert the rule laid down in *Millaudon et al. v. McDonough*. The case in 12 Ann. says: "The rule of practice, which, in an action of slander of title, imposes on the defendant, who reconvenes and sets up title to the property, the burden of proof which rests on the plaintiff in a petitory action, applies only to a case *where the defendant is out of possession*." And, in *Chas. Van Wych v. Myra Clark Gaines*, cited from 13th Annual, the Court said: "The action of jactitation of title has for its object the repose of titles. It is brought by the possessor only. Its tendency is to force *the party NOT IN POSSESSION*, who yet asserts a right out of court to come into court and disclaim or assert the right judicially.

Applying the law and authorities thus considered to the case at bar, we find that plaintiff's suit is not a petitory action, and that defendant's cross-suit, or demand in reconvention, partakes of that nature—and, consequently, the burden of proof rests upon the latter, under article 44 of the Code of Practice, to establish his title, in order to recover and turn plaintiff out of possession.

Act 47 of 1873, under which defendant derives title to the property in controversy, provides: "That in case of refusal or neglect of any person against whom property is assessed to pay the taxes thereon, within ten days after the expiration of the public notice required by law, the tax collectors may give ten days written or printed notice to the owner or agent of the property assessed, to pay said tax, after which delay, if not fully paid, the said tax collector may make a seizure of such

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property by recording a description of the same, with the amount due, in the mortgage book of the parish where it is situated; and, on the fourth day of such recordation, shall proceed to sell said property, without legal process, to pay said tax, and all lawful costs, after advertising three times within ten days, in the official journal; and in the country parishes, where such publications cannot be made, by public notice for such ten days."

The first step to be taken to effect a valid transfer by the State tax collector, under Act 47 of 1873, was to be satisfied that public notice had been given to the owners or holders of property assessed to come forward and pay their taxes; and then, if, within ten days after such notice, the tax was not paid, it was incumbent upon the tax collector to serve a written or printed notice upon the owner or agent of the property assessed to pay said tax; after service of such notice, and a further delay of ten days, upon failure of the owner or agent to pay, the tax collector was authorized to seize the property, by recording a description of the same, with the amount of the tax, in the mortgage book of the parish where the property is situated; and, on the fourth day of such recordation, he was directed to advertise the property for sale, such advertisement to appear three times, within ten days, in the official journal of the parish.

The evidence offered in support of the tax-title of defendant, consists of—

1st. The advertisement of the sale, which appeared in the New Orleans Republican on the 12th, 20th and 24th day of March, 1875.

2d. The tax collector's deed, executed September 6th, 1875; and

3rd. The formal act of sale passed before Chas. A. Thompson, notary public, in confirmation of the deed of the 6th of September, 1875.

We have examined this evidence, in vain, to find a recital of

the preliminary steps provided for in the Act of 1873; nothing is contained in such evidence to the effect that notice to the owner to come forward and pay the tax assessed was ever published; that written or printed notice to pay was served upon the owner or agent; that seizure of the property was effected by recording a description thereof, with the amount of the tax, in the mortgage book of the parish where the property is situated; or that an advertisement of the sale was made *three times within ten days*, in the official journal.

Not one of the above referred to requisites is mentioned, except the advertisement in the official journal, which, from the recital in the deed, was not made three times within *ten* days, but three times within *twelve* days.

Moreover, the advertisement does not contain a description of the property with sufficient certainty to enable the public to know what property was to be sold. The description given reads as follows: "A certain lot of ground in square No. 22, bounded by Levee, St. Thomas, Sixth and Seventh streets, fronting on Levee street, measuring 18 by 123 feet." From such a description, it is impossible to ascertain what lot, fronting on Levee street, in the square mentioned, is referred to. There are, generally, ten or eleven lots fronting on each street bounding a square, and the only designation given in the advertisement is, that it is one of such lots, in square No. 22, having a front on Levee street.

Where the owner of property is compelled to give it up, through the sharp and summary process of a tax collector's sale, it is the manifest policy of the law to hold the tax collector to a strict and close compliance with every legal requisite; and no tax title will be enforced unless it is affirmatively shown that he has done every material act and thing required of him by law.

Person *v.* O'Neal and others, 32 A. 228, and authorities there cited.

Judgment affirmed.

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No. 84.

D. R. CARROL v. W. H. PETERS.

1. Where a note expresses upon its face that it was given for a valuable consideration, it makes out a *prima facie* case upon this question, despite the denials of the answer.
2. This presumption may be rebutted, and the burden of proof shifted by evidence, casting doubt or suspicion upon the execution of such a note.
3. The impeaching circumstances need not be strong in order to cast the burden of proof upon the holder.
4. The mere fact that a note was given for accommodation does not impose the burden upon the holder of proving his title and *bona fides*.
5. When, by his own assumption or by suspicious circumstances, the burden is upon the holder of commercial paper, he is bound to fully disclose his title and establish it clearly. He must give dates and all particulars connected with his acquisition.
6. In the face of close and searching questions, mere sweeping declarations, that the paper was acquired in good faith, or for a good consideration, or before maturity, are not sufficient.
7. The inability or unwillingness of a holder to furnish specific information upon these matters, is itself a suspicious circumstance.
8. Where a tender of the books of a firm in evidence is made, and objections made and reserved only upon special grounds, which are untenable, the evidence will be considered.
9. The rule is not that a defendant must first impeach the title of plaintiff to the note sued upon, but, on the contrary, that he must first establish his right to raise such a question before he will be heard presenting it.
10. Where a party himself calls for the production of particular books, he will not be heard objecting to them as evidence.
11. Where the accommodation paper is not negotiated until after its maturity, the party lending his name cannot be held responsible therefor.
12. Legal responsibility, depending solely upon implication, can follow only such circumstances as cannot be reasonably explained, except upon the supposition that the party intended to bind himself.

*Appeal from Third District Court. Monroe, Judge.*

*F. R. King* for plaintiff.

*Bayne & Kenshaw* for defendant, appellant.

MCGLOIN, J.—Defendant is sued upon an accommodation note, given Wallace & Cary, late a commercial firm of this city.

The answer sets up the character of the paper, and expressly attacks plaintiff's title. The case presents questions of law and fact, as follows :

First—Is the fact that the note sued upon was accommodation paper sufficient, of itself, to put the burden of proof as to title upon plaintiff; and if not, what is sufficient to shift the burden of proof?

Second—Did plaintiff acquire the note in question for a valuable consideration, before maturity, and in due course of trade?

Third—Does the taking of accommodation paper, after maturity, affect the right of the holder to recover?

1st. A note which expresses upon its face that it is for value received, certainly makes out a *prima facie* case in favor of its holder, despite express denials in the answer. 8 Martin N. S. 294; 2 La. 455; 4 La. 220; 14 La. 254; 2 R. 25; 4 R. 196; 1 La. An. 326; 3 La. An. 136, 331; 4 La. An. 531; 10 La. An. 683; 15 La. An. 41, 382, 353, 459; 21 La. An. 200, 513; 28 La. An. 94; Daniels on Negotiable Instruments, § 160, 163, 164.

Our authorities are almost uniform in support of the proposition that this presumption may be rebutted and the burden cast upon plaintiff to establish his title by evidence casting a doubt or suspicion upon it. 3 La. An. 304; 9 La. An. 22, 234; 10 La. An. 792; 12 La. An. 373; 14 La. An. 121; 15 La. An. 41, 459; 18 La. 357; 4 R. 196; 9 R. 183.

The circumstances to which this effect has been accorded in some of these authorities were such as to justify the conclusion that, in the jurisprudence of this State, the presumption is not a strong one, and that slight impeaching circumstances will be sufficient to shift the burden. We do not consider this at all unreasonable. Where the real facts are such as would, if disclosed, defeat the recovery of a plaintiff, defendants are entitled to fair treatment and adequate protection from the courts. To allow such a holder to recover, is to perpetrate or sanction a wrong; and no arbitrary rule, which shuts out the light or renders its access difficult is entitled to respect. A holder of negotiable paper, besides holding the affirmative of the issue,

is familiar with the history of his connection therewith and has usually the means wherewith to establish it. Since the law of evidence has been so universally amended as to permit parties in interest to testify, there can be but little difficulty in establishing titles where they are valid and *bona fide*. On the other hand, a party to negotiable paper who has been wronged in connection therewith, usually finds the instrument coming to him through a stranger. Such stranger will not readily furnish information detrimental to himself, nor will the person through whose wrong the injury has been inflicted readily confess his misconduct or aid in its exposure. It will be noted, that because by such slight circumstances a plaintiff is compelled to disclose his title, it does not follow that upon trial they will be held sufficient to defeat his recovery. The two questions are quite distinct.

The interests of commerce already inflict sufficient hardships upon unfortunate parties to commercial paper without imposing upon them the additional one of fully establishing a negative or furnishing complete light upon matters not easily within their reach and entirely familiar and easy of proof to their opponents. *Porter v. Garrison*, 2 Grant's Cases, 297.

We do not, however, consider our authorities as going so far as to explicitly hold that the party to accommodation or other similar paper, who, voluntarily and not through error or fraud, puts paper, without consideration to himself, upon the market, can, by simply proving this fact, impose the burden of proof upon his opponent. In absence of any precedent in our courts having been brought to our notice going explicitly to this extent, we consider the ruling in *Mills v. Barber*, 1 M. & W. 125, as sound in law.

2d. In this case, however, defendant has succeeded in making proof of circumstances which strongly militate against the title of the plaintiff. He shows that this note was delivered to Wallace & Carey about its date, July 18, 1878, and was payable in sixty days; that upon the books of that firm it was, at its date, properly entered as accommodation paper, being

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credited to W. H. Peters' accommodation account; that on November 18, 1878, *nearly sixty days after its maturity*, it was credited back to said account as "not used." It was shown that the note was never presented to Peters until some days after the last entry upon the books of Wallace & Carey, and long after maturity, and then, although endorsed by Wallace & Carey, it had neither been protested nor had protest been waived by the endorsers, yet when suit was brought there was such a waiver thereon. We consider these circumstances as being sufficient to shift the burden of proof, and as imposing the obligation upon plaintiff of clearing his title from the suspicion which rests upon it. He himself recognized their force and attempted to prove consideration and *bona fides*. Having assumed this task, whether necessarily or not, he must be held to its performance in a complete and satisfactory manner.

Wherever, by the circumstances or by his own assumption, the burden of proof is cast upon a holder of commercial paper, he is bound fully to disclose his title and to establish clearly consideration and *bona fides*. In order to comply with this obligation, he should give date and particulars of price and circumstances connected with the taking, at least to such extent as to enable the court or jury to determine for itself the character of his title. Mere sweeping declarations that a valuable consideration was paid, and that it was taken in due course of trade and before maturity, while perhaps sufficient, if the opposite party chooses to rest satisfied therewith and neglects to cross-examine, will not suffice, if upon closer cross-examination, the holder or his witnesses refuse, or are unable, to furnish details. If this were all that was required, the holder might be still more vague and general in his proof, and confine himself to the simple statement that his title was good. Indeed, the fact that a holder refuses or is unable to be specific when required so to do, but strengthens the suspicion resting upon his title instead of clearing it as such evidence should do.

In this case, plaintiff says he is unable to give the date at which this note came into his hands or specify the particular

transaction with which it was connected. He merely declares that it was handed him as collateral to secure him for loans; but what loan, or whether given before, at the time of, or after the loan, he fails to show, although questioned. So, also, he cannot state the date of receipt, either exactly or approximately, but satisfies himself, in reply to persistent interrogation, with the broad assertion that he took it before maturity, that he kept no book, account or memorandum showing these facts, nor could his memory supply the information. As the burden was cast upon him by suspicious circumstances already developed, this inability, whether actual or feigned, but adds weight to the doubt, which it was his duty fully to remove. When to this is added a similar unwillingness or inability to specify, upon the part of a member of the firm of Wallace & Cary, who delivered this instrument to him, and was produced by plaintiff to establish his title, the suspicion is rendered still more strong.

We shall not enter upon the question of consideration between Wallace & Cary and plaintiff, because, in view of plaintiff's failure, as remarked above, we do not consider that he has established his receipt of the note before maturity. We still further believe that defendant has, by strong circumstantial evidence, shown that this instrument was in the possession of Wallace & Cary after it fell due. We have mentioned the entries in the books of that firm. Plaintiff claims in brief that he excepted to their introduction in evidence upon the ground that they were, as to him, *res inter alios acta*. Referring to page 31 of the testimony, we find here that plaintiff's counsel urges the same objection as he had already made, as covered by the bill of exceptions taken. This bill and the notes, in the course of the testimony relative thereto, show that the objection reserved was to the right of defendant, before proving that plaintiff had received the note sued upon after maturity, to show that it was accommodation paper. We find also, that, instead of objecting to these books, plaintiff's counsel himself called for their production, and received a



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promise that they should be forthcoming. In addition to this, the entries in question are, we think, substantially verified by the one who kept these books, and under all the circumstances they are entitled to weight as evidence. The real objection of plaintiff is without force, because the rule is not that a defendant must first impeach the title of the plaintiff, and then show his interest in presenting the issue, but the reverse; for he will not be listened to questioning the right of the holder of negotiable paper, unless he shows that he would have a good defense against the instrument if in the hands of the original payee. Whether a defendant, fairly presenting these issues in his pleadings, can be controlled in the order of administering his proof, we are not called upon to determine.

The failure to present and protest, plaintiff declares attributable to his having overlooked the paper, and neglected to deposit it in bank with his other notes. Mr. Cary, witness of plaintiff, from whom he received this note, although stating in general terms that the transfer was made before maturity, yet declares that he thought he had returned this paper to Peters, with others of the same kind, just before the affairs of his firm were placed in the hands of receivers, and was much mortified to find that he had omitted to do so unintentionally, and that, at the time, it was his supposition that this had been done.

Amongst the things shown upon a list of collaterals held by plaintiff against Wallace & Cary, are a large number of open accounts, judgments, stale notes, and policies of life insurance upon the lives of debtors of that firm, and some lands, securities which are not usually given, or exacted by lenders of money, where solvent and unsuspected parties are the borrowers, and it is not improbable that these sweepings, with the note sued upon included, either intentionally or inadvertently, were transferred to plaintiff when the inability of Wallace & Cary to proceed in business was discovered or acknowledged, and after the entry upon the books already mentioned, and consequently after the maturity of this note. At all events, we

consider that not only has plaintiff failed to show that he took this note before maturity, but that defendant has rendered it reasonably certain that the transfer was after the note had fallen due.

3d. There is conflict of authority upon the question whether the taking of accommodation paper, after maturity, defeats the right of a holder to recover. Mr. Daniels, in his work on Negotiable Instruments, § 786, 726, holds the opinion that the time a person receives such paper makes no difference. This opinion is advanced upon the strength of certain English authorities, and he regrets that the American authorities are not uniformly to the same effect. So far as we have had access to them we consider the weight of American authorities as being opposed to the doctrine incorporated in his text. In Pennsylvania the authority of *Hoffman v. Foster*, 43 Penn. 137, and *Bower v. Hutchinson*, 36 Penn. (12 Casey) 285, are to this effect; and in the latter case the following authorities from that State are cited in its support, 7 Watts, 130; 6 Barr, 164; 1 Harris, 222; 6 Harris, 361. The doctrine in Massachusetts is the same as in Pennsylvania, *Kellogg v. Barton*, 94 Mass. (12 Allen) 527; and also in Alabama, *Battle v. Weems*, 44 Ala. 105. In New York, as late as 1869, the Court of Appeals has exhaustively considered this question and held to the same effect, expressly overruling 7 Johns. 361, and 7 Wend. 227, the principal American cases holding the reverse upon this question, declaring that this issue was not involved in those cases.

And when we refer to the English precedents it is not certain that the weight of authority upholds the text of Mr. Daniels. See cases of *Tenson v. Francis*, 1 Camp. 19; *Brown v. Davis*, 3 T. R. 80; 7 T. R. 429. As against these are cited, *Charles v. Marsden*, 1 Taunt. 224; *Atwood v. Crowdie*, 1 Starkie, 483; *Stein v. Yglesias*, 1 C. M. & R. 565; *Sturtevant v. Ford*, 43 E. C. L. R. (4 M. & G.) 101; *Carruthers v. West*, 63 E. C. L. R. (11 Q. B.) 143.

Of these, *Stein v. Yglesias*, 1 C. M. & R. 565, should be more

properly ranked upon the other side. There the question was as to the sufficiency of pleadings; and the Court said to counsel: "*You do not state that the bill was accepted before it became due. An accommodation acceptor might, to assist his friend, accept such a bill.*" There is nothing whatever to lead to a conclusion that the defendants intended to limit the negotiability of the bill to the time before it became due. You had better amend and plead all the facts, to exclude a right in the person accommodated to negotiate the bill after it became due." This language justifies the inference that, had the date of acceptance been properly set out, it would have been sufficient, and the plea held good.

And in the later case of *Parr v. Jewell*, 81 E. C. L. R. (16 C. B.) 684, the court casts grave doubts upon the doctrine of *Charles v. Marsden*, 1 Taunt. 224, if it is not almost expressly repudiated. The authorities followed seek to establish an exception unfavorable to accommodation paper, to the rule that paper, after maturity, passes subject to defenses. To justify such an exception its necessity and equity should be clearly established. The general law of transfers is, that the transferee stands in the shoes of the transferror. This rule, however, is set aside, in favor of persons receiving commercial paper, but only when such paper is free from suspicion. The moment it is dishonored by non-payment, it comes from under the exception and passes under the dominion of the general rule. *Daniels on Negotiable Instruments*, § 724. A person, therefore, taking accommodation paper, although originally invested with the privileges of commerce, after maturity, stands in the same position as though the paper had been originally restricted. He has the rights which the beneficiary had, intrinsically, to confer, and no more.

A person lending his name to another is, under the circumstances, entitled to every safeguard and restriction, expressed or implied, by his agreement. In other words, the paper cannot be used except in the manner contemplated. It is well settled, that a person soliciting such accommodation impliedly

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*Carrol vs. Peters.*

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obligates himself, either to personally honor the instrument at maturity, or to put his friend in funds to enable the latter to meet it. *Reynolds v. Doyle*, 1 M. & G. 735, 39 E. C. L. R. 638; *Yates v. Hoppe*, 67 E. C. L. R. (9 C. B.) 541. When, therefore, a party applies to another for such assistance, the maturity of the paper is put at such time as the applicant considers sufficient to enable himself to meet or provide for it at maturity. The applicant impliedly declares that his necessities will then be at an end, and the other practically stipulates that his liability shall endure no longer.

If the beneficiary otherwise surmounts the difficulties or meets the exigencies of the moment, and does not use the paper before the expiration of this period, he has no right, without his friends assent, to apply it to other, or subsequent purposes. So, where the maker, or endorser lends his name for a stipulated period, he does not give an unrestricted or unlimited credit, and to hold him bound beyond the period contemplated, is to hold him beyond the terms of his contract. As the holder of paper, after maturity, can recover only when the party passing it to him had the right to do so, and the agreement resulting in the note, or circumstances connected therewith, do not prohibit the transfer, we do not think that *Wallace & Cary*, in this case, had the right to pass, or plaintiff to receive, the paper sued upon to the detriment of defendant. The fact that the paper is not reclaimed after maturity does not affect the defense; because there is no greater presumption against this defendant than against any other maker of a note, who, paying, or otherwise extinguishing it, neglects to take it into his possession. He had the right, not being himself called upon at maturity to pay the note, to suppose that *Wallace & Cary* had taken it up and extinguished it with their own funds, and to give himself no further concern about it. In fact, when plaintiff took the note, he had as much right to consider that this had been done as to suppose that *Wallace & Cary* had never used it, for when endorsers take up paper, it is not proper or usual for banks or other holders to cancel, or mark as paid, the obligation.

Nor should legal responsibility follow upon circumstances tending to create an implied contract or liability, unless the circumstances relied upon afford no other reasonable interpretation or explanation, except that the party sought to be charged intended to bind himself. It is only when the acts set up are such as to lead an innocent person reasonably, if not almost exclusively, to suppose that the party performing them intended to create a liability, that such liability can spring up. Persons are not called upon to so guard and regulate their contract as to avoid every possibility of mis-construction.

Where canceled paper lies still in the hands of others than the party entitled thereto, the fact may be explained upon many hypothesis besides that of intending still to keep it in currency. On the contrary, for motives of convenience, by universal custom, when paper reaches maturity, whether accommodation or other, and the parties desire to continue the relations it evidences, it is always either renewed or extended upon its face. In view of these facts, when paper is past due, and not so renewed or extended, the more reasonable supposition is that this omission was attributable to design, and that the paper was not intended still to run by those who were bound upon it.

Judgment reversed.

Rehearing refused.

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No. 57.

**DELAUME BROTHERS v. AGAR & LELONG.**

1. "Days of grace are no obstacle to compensation." C. C. 2209.
2. It is only where there has been an adjudication in bankruptcy, or a petition filed to secure such adjudication, that the bankrupt laws of the United States have authority to supersede the general laws of this State.
3. The terms "factor" and "commission merchant" are synonymous.
4. Definition of the term "factor."

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5. One who has dealt with a factor may be sued by the principal in his own name for the price of property purchased of such factor; but, ordinarily, he may set up against such principal every defense, set-off, or compensation included, which would have urged against the factor had the suit been in the name of the latter.
6. Good faith is the foundation upon which rests the right to compensate.
7. Where a person purchases *for cash*, he will not be permitted to compensate the price with a pre-existing debt of the vendor.
8. A stipulation for prepayment of the price, or payment at the moment of delivery, is not essential to a cash sale.
9. It is sufficient to constitute such a sale, that there has been no agreement, express or implied, preventing a demand at any moment for the price.
10. Where sugars are sold without express declaration as to the time within which the price is to be paid, and the general usage is, that where the purchaser is of good commercial standing, the price is not demanded for five days, held:

By McGloin, Judge:

The usage entered into, and formed part of the contract, and the sale was one upon a credit, and not for cash.

By Rogers, Judge:

The usage was to consider such sales as made for cash, and the sale in this case should be so considered.

*Appeal from Sixth District Court. Rightor, Judge.*

*A. Grima* for plaintiffs, appellants.

*T. Gilmore & Sons* for defendants.

MCGLOIN, J.—Plaintiffs, sugar planters, consigned ten hogsheads of sugar to John I. Adams & Co., wholesale grocers and commission merchants of this city, who sold it in their own name to defendants. At the time John I. Adams & Co. were indebted to Agar & Lelong in a sum far exceeding the price of said sugar, evidenced by a note, whereof the days of grace were running when said sale was made. When the bill for the sugars was rendered in the name of John I. Adams & Co., that firm had suspended, and Agar & Lelong gave immediate notice of their intention to compensate; and, as their defense in this suit, they advance that plea. It is combatted on the grounds:

1st. That the debt of defendant was not due at the time they sought to compensate.

2d. That at the time John I. Adams & Co. were insolvent, and to allow compensation would be to give an unfair preference to Agar & Lelong over other creditors, in violation of the bankrupt laws of the United States.

3d. That the sugar sold was not the property of John I. Adams & Co., and could not, therefore, be applied to the payment of their debts.

4th. That good faith being the foundation upon which rests the right to compensate, and this sale being for *cash*, it would be against good faith and the contract to withhold the price by reason of an old indebtedness.

First—Article 2209 O. C. disposes of this objection, by declaring that “days of grace are no obstacle to compensation.”

Second—An examination of Sec. 5073 of the late Bankrupt Law of the United States satisfies us that set-off, instead of being denied in a case like the present, would have been made obligatory. At all events, there has been no adjudication in bankruptcy, or petition filed for that purpose, in which contingencies alone the bankrupt laws of the United States have power to supersede the general laws of the State. Nor are we satisfied that such questions, involving only relative nullities, can be presented in this collateral manner, or by parties who, in their pleadings, repudiate the relation of creditors of John I. Adams & Co., which class alone have the right to complain of the unfair preferences of that firm, if any.

Third—The general rule is that one person's property shall not be applied to the payment of another's debt. But there is another and mastering principle, to the effect that one confiding his property to another, to be by him controlled and disposed of as his own, is estopped from disputing such apparent title to the prejudice of persons who have dealt with the agent in good faith, and in ignorance of the true state of facts. Plaintiffs entrusted their sugar to commission merchants, and such merchants are *factors*, and so affected by legislation and

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precedent applicable to agents of that character. *Graham v. Duckwall*, 8 Bush. 12; *Perkins v. State*, 50 Ala. 154. A factor is one who receives goods from another usually at a distance, with authority to sell them in his own name, and without disclosure of principal, which he usually does. *Baring v. Corrie*, 2 B. & Ald. 143; *Graham v. Duckwall*, 8 Bush. 12; Wharton on Agency, § 375; Story on Agency, Secs. 401, 110, 34, 112, 161, 266. The party in real interest being undisclosed as to third persons, the agent is considered the owner and principal in all contracts relative to property he so controls. Story on Agency, Secs. 111, 112, 401, 34.

Where, without special restrictions, a person consigns his property to an agent, possessing by law or usage such powers, he confides it, with authority to control and dispose of the same as his own, and third persons have the right to treat with the agent accordingly. *Rathbone v. Williams*, 7 T. R. 360, (2 Durn & E. 361); *George v. Clagget*, 7 T. R. 359, (2 Durn & E. 359); *Stracy v. Decy*, 7 T. R. 361, (2 Durn & E. 361); *Hogan v. Shorb*, 24 Wend. 461. Although, under such circumstances, the unknown principle may appear and sue, in his own name, upon his agent's contract, he can do so only subject to every defense, compensation or set-off included, which could have been urged against the agent, had the suit been in his name. Same citations. Also, Wharton on Agency, Secs. 405, 465, and authorities in Note 2 to Sec. 465. Such is also the French law upon this subject. Troplong, *Mandat*, No. 524 *et seq.*; Massé, *Droit Commercial*, No. 374 *et seq.*

It is urged that, by custom, planters' sugar alone is sold on the levee of this city, or by broker. Were this satisfactorily shown, the cases of *Semenza v. Brinsley*, 14 E. C. L. R. (18 O. B. N. S.) 467; *Henry v. Marvin*, 3 E. D. Smith, 71; *Bliss v. Bliss*, 7 Bosworth 339, and authorities in this last, cited by Robinson, judge, might be applicable. We do not, however, consider such customs established.

Fourth—The principle that good faith is the foundation upon which must rest the right to compromise, is firmly set-



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tled under our law. *Nolan v. Shaw*, 6 La. An. 46; *Avery v. Purvis, Wood & Co.* 7 La. An. 35; *Gilbeau Bros. v. Melançon*, 28 La. An. 627; *Pardessus, Droit Commercial*, vol. 1, No. 335; *Merlin, verbo Compensation*, par. 2, No. 11. C. C. Art. 2210, declaring that compensation takes place, whatever be the nature of either debt, except in the cases therein specified, is cited to the contrary. Other sections of the Code, either by expression or implication, annul all contracts, rights and privileges acquired by fraud or deception; and these are of equal dignity with the article cited, and it must be interpreted so as to harmonize with them.

It seems clear that, where a person purchases and declares, by expression or implication, that he will pay *in cash*, and in face of such a promise attempts to withhold the price under pretext of compensating with an old claim against the vendor, the attempt is in bad faith, and even fraudulent, and the citations, 6 La. An. 46; 28 La. An. 627, and from *Pardessus* and *Merlin* would apply.

Nor is it certain that such conduct would not be excluded by the terms of the contract itself. Compensation operates between two *debts*. Where property is alienated, with the understanding that the price is to be paid *in cash*, it would seem that the parties have expressly stipulated that no *debt*, strictly speaking, shall arise between them by virtue of the transaction, and, consequently, that there shall be no compensation. Cash means "*ready money*;" and where it is agreed that the property shall be paid for in such money, it is not a compliance with the contract to extinguish the price with an old indebtedness by way of set-off. Especially pertinent are these considerations when the vendor has particular reasons for requiring actual payment, such, for instance, as in this case, where he knew that in default of stipulation the price might be withheld from him by compensation, and when he was selling the property of another in no manner obligated for his debts. *Hogan v. Shorb*, 24 Wend. 463, is cited in opposition to these views; but we consider them supported by *Adams v.*

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O'Connor *et al.*, 100 Mass. 518; Keane *v.* Fisher, 9 La. An. 70; Gilbeau Bros. *v.* Melançon, 28 La. An. 629; Nolan *v.* Shaw, 6 La. An. 46; Pardessus, *Droit Commercial*, vol. 1, No. 335, p. 282. A stipulation for *cash*, or *ready money*, need not be accompanied by another declaring that payment shall be made before, or at the time of, delivery; provided only, that the vendor says or does nothing to preclude himself, or is not by law or usage precluded from demanding the price at any moment he chooses so to do. That such is the spirit, if not the letter, of our law, appears from many of its provisions. Article 2609, C. C., says that an auctioneer, selling for cash, "*may require the price immediately before delivery.*" So, C. C., article 3229 allows a vendor, on sales "not made on credit," to reclaim his property, under certain conditions, within eight days; whereas, one selling for credit must resort to his direct action for rescission, or content himself with the vendor's privilege. Revised Statutes, § 825, makes it a crime for one, who has purchased *for cash*, to dispose of the thing so purchased, and use its proceeds, with intent to cheat, for any purpose other than the payment of the original price. If there can be no *cash sale*, without payment of the price, at or before delivery, it is difficult to conceive the purpose of such a statute. Nor is the seller, under our law, held to the election indicated in Hogan *v.* Shorb, 24 Wend. 461. Articles 1926 and 2046, of our Civil Code, give him choice of three remedies. He may sue for general damages, for specific performance, or for the dissolution of the contract with damages. We cannot see why a person, selling for cash, may not call for the specific performance, by demanding judicially, if necessary, *ready money*, as stipulated, without thereby waiving the rights his foresight had reserved, and which attach, under our law, to sales of that character. To hold that a principal, driven to suit by the fault of a purchaser, claiming in the courts a specific performance under his agent's contract, waives the stipulation for cash, is to hold that the defendant profits by his own wrong, and that the ratification is of a contract different from that which was actually made.

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In view of the celerity with which business moves, in present times, it would, in most cases, be doing a vain thing to demand the rescission of the contract and seek for property which had floated beyond reach upon the tide of commerce. And if, under such circumstances, the seller cannot pursue for the price, without thereby forfeiting the advantages given by law to vendors for cash, we have a case both hard and unjust.

The question, therefore, forces itself upon us for determination, despite the delivery of the goods without requiring prepayment, whether this was or was not a sale for cash? The evidence shows that neither at the time of the sale, nor afterwards, was anything said with reference to how and when the price should be paid. We cannot suppose that the vendor contemplated leaving this important matter entirely to the discretion of the purchaser. He must, therefore, have considered that there was something outside the contract which rendered discussion upon this point unnecessary, by reason of its application to and certain determination of the subject. Here is certainly a case to which O. C. Art. 1964, by converse effect, may be applied. "Equity, usage, and law," says the Code, "supply such incidents only as the parties may reasonably be supposed to have been silent upon, from a knowledge that they would be supplied from one of these sources."

We have in this case the reason shown why the parties were silent in this regard. W. H. Renaud, a member of the firm of John I. Adams & Co., testified: "Q. What is the custom in matters of sales of sugar? Are payments made on the spot, at the very moment of sale? A. No; We collect at the office of the purchaser *five days after the purchase*. Q. That is the *generally accepted custom*? A. Yes; with good houses; with doubtful ones we collect before delivery." Alphonse Tertrou, commission merchant for sale of sugar and cotton, likewise testified: "Q. How are these sales made, for cash or on terms? A. The custom is to give five days time. Q. Is that what you mean by a *cash* sale? A. Well, it ought to be cash; but it is the custom that we never send the bill until five days after the day of the

sale, the day of the sale not included. That is the general custom." Mr. Richard Milliken, a sugar broker, also touches upon this point in his testimony, as follows: "Q. Is it customary to specify guarantee? A. I suppose not; our business is nominally for cash; sugars and molasses are always sold for cash. This is a cash market. Q. In those cash sales when is the money collected? A. The custom is *now* at the end of five days, to a house well known. If it is some one we don't know, we don't sell without the money down on the hogshead. Q. The defendants' (Agar & Lelong) was a firm well known in this city? A. Yes. Q. For a firm of that character five days is generally understood? A. Yes, sir." These three are not contradicted upon this point, either by expression or implication, by any of the other witnesses.

The members of this Court agree upon all the issues involved in this case and discussed in this opinion, except upon the question as to whether the sales under this usage are for cash or upon a credit, in which respect there is a difference of opinion. It will be seen that this usage is one thing as to solvent purchasers and another as to doubtful ones. The solvency of the defendant firm is proven and conceded. Furthermore, permitting, in face of such usage, a purchaser to take possession of the property without requiring prepayment, is a declaration of satisfaction with him as a vendee, and passes the contract under the dominion of the usage as applied to solvent houses. The purchaser thereupon takes, not as a matter of concession, but of right arising from a supplied incident of the contract, all the advantages of the usage. One of these is, that the price is not to be collected until five days after delivery, and the effect is the same as though this clause were written into the contract. It is impossible for me to consider such a sale as being one for *cash*, without satisfying myself that the distinction between *cash* and *credit* is entirely a matter of the length of the delay stipulated.

In striving to reach the true meaning of the word "cash," O. C. 14, directs us to take its "most usual signification." This

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word may be employed at all times as the synonym of money in general; but Webster declares that "*primarily*" it means "*ready money, money in chest, or on hand, etc.,*" and in view of the definition of the Code, article 2439, declaring a sale to be the giving of a thing "for a price in *current money*," the use of this word "*sale*" in conjunction with the word *cash*, so modifies the latter as to exclude the idea of its use as expressive of *money* as a consideration, in contradistinction to goods, property, etc., as in barter. This results, for if any thing but *money* be taken, the contract is not under our law a *sale*, but an "exchange," lease, etc., according to its circumstances. The only sense, therefore, permissible in this connection for the term "*cash sale*," is the primary one of a sale for ready money, as distinguished from one upon a credit. Having concluded, that where a person, by expression, or implication, stipulates for *cash*, what he reserves is the right to collect his money, at will, I do not feel justified in going to the extent of intimating that where parties have actually settled upon a definite period, however short, during which payment may be withheld, the sale is nevertheless for *cash*. Such a state of facts comes too clearly within Webster's definition of *credit*, No. 11: "time given for payment for lands or goods sold on trust, as a long or a short credit"

Nor, am I prepared to hold, that parties by calling a sale, which is really upon *credit*, a *cash* one, can change its character. The law deals more with the essential nature of things than with nomenclature; and in the interpretation of contracts, courts must be governed by the definitions known to the law, and not by mistakes of designation upon the part of contractants. *Herold v. Stockwell*, 32 An. 949. I do not express the opinion, that where third persons are not affected, parties may not agree that some, or all, the advantages accorded by law to cash transactions shall attach to their credit sales. But such an unusual intention should clearly appear, and in absence of explicit expression, is not to be inferred from a mere mistake in the use of names. Nor do I discover in this record

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anything approaching proof of a custom to consider a sale, essentially on credit, as one for cash, even if such a thing could come within the grasp of custom, and such custom could possess that *reasonableness* essential to the validity of all usages. The loose expressions of the witness Milliken, as to the character of this market, etc., absolutely without corroboration, and beyond the statements of the other witnesses, is certainly not sufficient to establish a feature of the usage, under consideration, so very peculiar.

Nor do I consider these views as conflicting with those expressed by the Supreme Court in *Fisher v. Keane*, 9 La. An. 70, and *Bonham v. Overton*, 6 La. An. 766. These cases were determined respectively in 1854 and 1851. The usage now under discussion seems to have been at both of said periods only in the process of formation. The recital in defendant's brief, in the first mentioned case, shows that some merchants allowed two, others four, five, and even ten days' delay. The Court, therefore, in its opinion, in view of this absence of that concert, resulting in certainty essential to a valid custom, justly declared these delays to be "a mere act of courtesy, and not of right." So, in *Bonham v. Overton*, this undeveloped usage was declared to be a matter "of courtesy, resting in the vendor's discretion."

We will, also, observe that in *Keane v. Fisher*, the clerk of plaintiff swore that in the negotiation the matter of payment was expressly discussed and cash stipulated for; and the Court declares that it was a careful consideration of that testimony which led it to a conclusion. In view of such expression of intention, usage could supply no incident to that particular contract, under the the provisions of C. C. Art. 1964. In this case, there was nothing said upon this point, and the usage, judged by the testimony before us, has since 1854 matured and developed, until it has attained the certainty and universality it then lacked. I believe, therefore, that the sugars in question were not sold for cash, and am of the opinion, that the judgment appealed from should be affirmed.

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By reason, therefore, of the failure of the members of this Court to agree as to the character of the judgment which should be rendered, under the law, the judgment appealed from stands affirmed; appellants to pay costs in both courts.

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ROGERS, J., *dissenting*. The facts in this case, in my opinion, warrant the conclusion that the sales of sugar on the levee, at New Orleans, are cash sales; that the commercial usage is, that when sales are made to persons or firms recognized as solvent, collections are made five days after sale; if not considered solvent, cash upon delivery. By the term cash, we must understand money, and applying the term to sales, we must understand it in a sense distinguishing such transaction from a barter, exchange, or credit sale.

As the custom is well established, and the daily transactions are had in accordance with it, to my mind it would change entirely the character of these business transactions; for when it is understood between the parties that the transaction is for cash, the view of my colleague places upon it an entirely different character, and calls it a credit sale.

The custom of extending the payment for five days is not unreasonable; it is not in violation of law, and courts should, under such circumstances, recognize the force and validity of commercial usage, in order to exactly apply the evident intentions of parties to their contracts.

In 9 An. p. 90, I think this view is expressed by the Supreme Court, and while the facts of the present case differ somewhat from the facts there reported, the legal propositions announced apply with great force. My opinion is that the judgment of the lower court, which was for defendant, should be reversed, and one rendered for plaintiffs.

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Herron vs. McEnery.

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No. 105.

FRANK J. HERRON v. JOHN MCENERY.

1. The books which the Recorder of Mortgages for the parish of Orleans has purchased and placed in his office to be used for making the inscriptions authorized and required by law, and which have been partially filled, have been, by such use, dedicated to the public service, and they are no longer susceptible of private ownership.
2. It is the duty of such officers to do everything necessary to a prompt, faithful, and intelligent discharge of the duties imposed upon them by law.
3. The researches, or memoranda, of mortgages existing against certain persons, which have been made by the clerks of the recorders, and which are used in facilitating the preparation of certificates of mortgages, are archives of the mortgage office, and not the private property of the recorders.

*Appeal from late Fifth District Court. Rogers, Judge.*

*W. S. Benedict* for plaintiff and appellant.

*John McEnery* in person.

The opinion of the Court was delivered by J. O. Nixon, Jr., Esq., judge *ad hoc*, sitting in place of Rogers, judge, recused.

NIXON, Jr., Judge *ad hoc*.—Plaintiff herein, Frank J. Herron, was the Recorder of Mortgages of the parish of Orleans up to the 11th January, 1877, on which day he was succeeded by the defendant, John McEnery. He alleges in his petition that the defendant, on taking possession of his office, took also possession of certain private property of the plaintiff; and that he still has the said property in his possession, and he sues and prays for a judgment for the value of said property. A writ of sequestration was issued, which was bonded by the defendant.

The property of which the plaintiff claims the ownership consists of—1. The furniture contained in the mortgage office, such as desks, etc. 2. The blank pages of certain record books yet unused. 3. Certain blanks, being heads for certificates, and judgments; and 4. "Private memoranda of certificates of mortgages issued by the mortgage office, com-



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monly known as researches." The defendant answered, averring that he had no claim to the furniture; but that the other property, whose value was sued for, were public records of the mortgage office and archives thereof, and as such the defendant, as Recorder of Mortgages, was entitled to their possession and use. The City of New Orleans intervened, and prayed the Court to adjudge that the researches were public property and part of the archives of the mortgage office. Upon these issues a judgment was rendered by the late Fifth District Court for the parish of Orleans dismissing the plaintiff's suit.

1. The value of the furniture is no longer in controversy, as it has been surrendered to the plaintiff.

2. It appears that when the defendant took possession of the office of Recorder of Mortgages, there were a certain number of record books therein that were only partially filled; plaintiff claims that he is entitled to be refunded the proportionate amount that he paid for said books. The claim is not well founded. The law requires the books when opened to be paraphed by one of the district judges of the parish of Orleans; entries are then made therein; when so used, they must be considered to have been dedicated to the service of the public; the ownership of plaintiff in them ceased the moment that he made the first entry in them. To recognize his right to be paid for the unused pages would be to recognize his right to remove the unused pages if he so desired. It was his duty to furnish himself with the proper amount and kind of books necessary for the proper discharge of the duties of his office; if in so doing he has obtained books larger than is necessary, that furnishes no reason why he should have the right to reclaim a portion of them from the public service to which he has dedicated them.

3. As to the blank certificate and judgment heads left in the mortgage office and taken possession of by the defendant, it not appearing that they had been written upon in any way, and being in nowise public records, the defendant must pay their value.

4. It appears from the evidence that the researches, valued at \$500 by the plaintiff, consisted of memoranda showing the mortgages recorded against certain persons and filed away. They are of use in facilitating the work of the office, because they show mortgages recorded against persons up to the date of the last examination, hence a search need only be made for mortgages recorded since the date of the memorandum.

It appears that the plaintiff purchased these memoranda from his predecessor, Dr. Southworth, for \$500, and Southworth from his predecessor for \$250. Dr. Southworth states that his predecessor also purchased them. The researches date back to about 1859 or 1860; they are of great use in facilitating the making of certificates; certificates, however, can be made without them; they were made by the clerks in the mortgage office at various times in the course of their duty. The plaintiff's position is, that because these researches were not accessible to the public, they were useful to facilitate the discharge of the duties of the office, but not indispensable, and were made by clerks who were paid by the plaintiff and his predecessors, therefore they are private property. The fallacy of this position lies in the assumption that the mortgage office exists for anything else than the benefit of the public. The law gives to the recorder certain fees, and provides that he shall pay his clerks, buy his own stationery, etc.; the presumption is that out of the fees he collects he pays the expenses of properly conducting his office, leaving a reasonable compensation for himself. If the making and filing away of these researches materially hastens the work of the office, thus accommodating the public, it is the duty of the recorders to make them, for it is their duty to do everything necessary to a prompt, faithful and intelligent discharge of the duties imposed upon them by law; and having made them, they become a portion of the records and archives of the office. The labor of the clerks in the mortgage office does not belong to the recorder personally; the money that he pays them with comes from the public in the shape of fees paid to him, and the public is en-

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titled to any facility of public business which their labor may create.

The fact that plaintiff paid his predecessor for the researches is irrelevant, as such payment could not have been legally demanded of him, and the force of plaintiff's argument that it is customary to pay for the researches is broken by the fact that such payment is only proved for about ten years back, whereon the researches have been in existence nearly thirty years.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed; and proceeding to give such judgment as should have been given in the lower court, it is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, Frank J. Herron, and against the defendant, John McEnery, for the sum of five dollars, with legal interest from judicial demand and costs of both courts.

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No. 82.

J. P. BECKER v. FRED. H. QUICK AND H. H. AHRENS.

1. It is the duty of an appellant to furnish a full, complete, and correct transcript or record, with due and proper certificates.
2. Where, through inadvertence, not amounting to gross negligence, the record is incomplete, upon application at the time of argument, or before, the court may, under provisions of C. P. article 898, allow time to remedy the defect.
3. If the record be defective through the fault of appellant, and he makes no timely effort to perfect it, the appeal will be dismissed.

*Appeal from the Sixth District Court. Rightor, Judge.*

*W. E. Murphy* for plaintiff, appellee.

*Simeon Belden* for defendant, appellant.

MCGLOIN, J.—This case came up regularly for trial in this Court. Upon the day fixed, counsel for appellee, in open court, moved to dismiss the appeal, upon the grounds that the record

contained no bill of exceptions or statement of facts, and that all the evidence adduced below is not therein; and that it does not contain the detailed list of the pleadings as required by rule No. 5 of the rules of this Court. Defendants were not represented before the lower court at the trial, and there is no bill of exceptions of any kind in the record, nor is there any statement of facts or assignment of errors. As this case involves more than five hundred dollars, and is subject to review upon the facts as well as the law, the absence of such bill of exception, or assignment of errors, might not affect the case were all the evidence submitted below brought up for our examination. The note of evidence, however, shows that there were records and documents offered and filed in evidence, which we fail to find now in the record. The certificate of the clerk does not declare that these records and documents are lost, missing, nor give any other reason for their not being produced. These pieces of evidence are material, and we do not consider that we have the right or facilities for reviewing the decree in the case, when the evidence which influenced the judge *a quo* is not before us.

The question is whether the appeal should be dismissed, or the cause proceeded with as the record stands, or remanded to supply the missing evidence. In the case of *Laura Grivot v. Rufus Waples*, No 38, on the docket of this Court, lately decided, we dismissed an appeal *ex propria motu*, for a material diminution of the record, and we see no reason why similar treatment should not be meted out to the appellant in this cause. To the authorities cited in that case, in support of the conclusion reached, may be added: *Prudhomme v. Murphy*, 5 Martin, N. S. 90; *DeBlieux v. Case*, 7 Martin, N. S. 260; *Bell v. Bell*, 4 La. 471; *Allain v. Preston*, 5 La. 479; *Boler v. Day*, 16 La. 252; *Roberts v. Benton*, 1 R. 100; *Dorsey v. Harding*, 1 R. 132; *Allen v. Arnoul*, 18 La. 437; *Clark v. Lardlaw*, 4 R. 380; *Thayer v. Littlefield*, 5 R. 152; *Adams v. Routh*, 8 La. An. 121; *State v. Tucker*, 7 La. An. 551; *Hall v. Beggs*, 17 La. An. 130; *Radovich v. Frigerio*, 27 La.

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AN. 68. These authorities we consider as far outweighing the few that exist to the contrary. *Childress v. Allen*, 10 La. 500; *Desommes v. Desommes*, 17 La. 115; *New Orleans v. Jeter*, 10 A. 767; *Succession of Sheehan*, 18 La. An. 278; *City v. LaCroix*, 18 La. An. 146; *Choppin v. Wilson*, 27 La. An. 444; *Succession of Woods*, 30 La. An. 1002. We consider the law, as settled by a majority of the authorities, and the most reasonable ones to be, that it is the duty of appellant to furnish a full, complete, and correct transcript or record, with due and proper certificates; that if, by inadvertence even of the appellant, not amounting to gross negligence, the record is incomplete, under Art. 898 C. P., upon his application at the time of argument or before, the court may allow time to remedy the error; but if the record be defective through the fault of appellant, and he makes no timely effort to perfect it, the appeal must be dismissed. Such is the disposition that we feel compelled to make of this cause.

It is, therefore, ordered that the appeal herein be dismissed at the cost of appellant.

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No. 109.MRS. V. FAISANS *v.* MINORS LOVIE.

1. Where one of two contiguous proprietors builds a wall between the properties, in accordance with the provisions of Civil Code, Art. 675, at his sole expense, such wall is the exclusive property of him who builds it, and so remains until the other contributes his share of the expense of its construction. C. C. 676, 683, 684.
2. The advantages flowing to a person from so contributing and making common what was before a private wall, is that such contributor may build against such wall, make cavities therein for the purpose of affixing his beams or joists, and affix to it any work, upon taking the precautions directed by law. C. C. Arts. 680, 685.
3. Unless such a private wall has been thus converted into one in common, the non-contributing neighbor has not the right to make any use thereof, however slight or immaterial.
4. Where, without pre-payment of his half of the expense of erecting such

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a wall, the neighbor attempts to make use of the wall, its owner may prevent him from so doing.

5. If, however, such attempted use be not casual or trifling, the owner of the wall may suffer the same to proceed or continue, and recover from the non-contributing neighbor, his share of such portion of the wall as he may have applied to his service.
6. Where the owner of the soil, permits his tenant to build against a wall, which has not become a wall in common, the owner of such wall may look to the proprietor of the contiguous lot for payment of the proper contribution.

*Appeal from the Third District Court. Monroe, Judge.*

*Omer Veleré* for plaintiff, appellant.

*W. S. Benedict* and *F. W. Baker* for defendant.

MCGLOIN, J.—Plaintiff and defendants are owners of contiguous properties in this city. Between the two there stands a partition wall of brick, erected at the sole expense of plaintiff, and for which defendants have paid no share.

The plaintiff claims that defendants, or their lessees, have erected certain buildings upon the property belonging to them, making use of said partition wall and rendering them liable for one-half of the value thereof.

The statement and documents, sent up with the record, establish the following facts, in addition to those already stated :

Defendants have rented their lot, with the privilege accorded their lessees of erecting buildings or other improvements, with the reserved right of removing the same at the expiration of their lease, if the lessors do not elect to purchase the same. These lessees have erected against the partition wall a long shed, resting on the side towards plaintiff's property, upon six or eight posts, twenty-six feet high. These posts simply rest upon the ground, and have no portion extending into or buried in the earth. The roof is made of tar and gravel, in composition, upon a foundation of paper, and at the point the paper is turned up a few inches and attached, by tar and paste, to the wall in question, forming a collar. The shed mentioned has no planking or partition towards the side of plaintiff's property, except her wall be considered as such.

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Under our law, C. C., Art. 675, a person first building on a place, where there are no walls of brick or stone, may rest the centre of his wall exactly upon the line of division between his property and that of his neighbor, provided that he build in brick or stone, at least as high as the first story; and provided, also, that his wall does not exceed in thickness eighteen inches, with a further allowance for plastering of three inches. "But he cannot compel his neighbor to contribute to the raising of this wall."

A wall so built at the individual expense of one of the neighbors is, in its entirety, the sole and exclusive property of him who builds it. *Jeannin v. DeBlanc*, 11 La. Ann. 466; *Lepage, Lois des Batiments*, sec. 160, fol. 43; *Rogron, Codes Annotés*, art. 674; *Dalloz*, vol. 30, p. 200.

At any time, however, that the other neighbor may so desire, he has the right to make such wall one in common, by contributing his half of the expense of its construction. C. C. Arts. 676, 683. The advantage resulting to him from making such construction a wall in common, lies in the privilege of building against this wall, and, if necessary, causing his beams or joists to penetrate therein to within two inches of its thickness. C. C., Art. 680. He has also the right to make cavities in such wall, and to affix to it any work, upon adopting such precautions as are proper and necessary, according to the opinion of persons skilled in building, to secure his neighbor against injury resulting from the cavities or new work.

If these be the privileges flowing from the relation of ownership in common in such structures, it follows that unless this relation exists on behalf of a contiguous proprietor, the right cannot be claimed in his favor to make any cavity in such wall or affix any works thereto without the consent of the exclusive owner.

These provisions of our Code are adopted from the law of France, and the French authorities are explicit and emphatic upon this point. *Lepage, Lois des Batiments*, sec. 160, fo. 43, is to the following effect: "When a wall is not common, it is

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well settled that the proprietor to whom it belongs has over it the exclusive right of use; the neighbor has not even the right of affixing thereto a trellis or other object, although the wall rests, without compensation to him, partly upon his lands; because the wall is the entire property of him who has constructed it." See also, to same effect, same author, No. 175, page 47.

So Rogron, Code Annotés, art. 674, holds: "But, if the wall belongs to the neighbor, he who wishes to build cannot attach thereto *any kind of work* before having acquired the right, or made the wall one in common." So, at the instance of Madame Ellevion, sole proprietress, the French courts compelled the Sieur Houbé to remove from such a wall a hedge-row of fruit trees (*Espalier*) set against the wall, and certain vines which rested thereon. Dalloz, vol. 30, p. 200.

It follows that the neighbor, who has not contributed to the wall, has no right, without the owners consent, to make any use thereof whatever; and the most simple structure, leaning against or attached to the wall, is a violation of the right of the owner as well as the sinking of rafters or joists therein, for the erection of large buildings. So, also, it is as much an exercise of the right which belongs to a joint proprietor to a wall in common.

It is true that the Code would seem to require a person desiring to make such a wall, one in common, to prepay his share of its cost, and until such prepayment, the exclusive proprietor can prevent the other from making use of the wall, but he may, if he so chooses, suffer the works to be completed, and, if they be not in character casual or trifling, proceed against the neighbor for his share of the cost; the clause requiring such prepayment being enacted in his interest. His neighbor has no right to avail himself of the wall in any manner without compensating the owner to an extent fixed by law, and the owner may treat the action of the other as an assumption of the character of owner in common, and an incurring of the obligation defined by law as accompanying



such assumption, and may demand payment in cash, or take a note, or otherwise deal with the debt, at his pleasure.

Under this view of the law, considering any act which is an exercise of the rights peculiar to ownership in common, as an assumption of this character, and of the legal responsibilities arising therefrom, we consider that by attaching the roof of this shed, whether by tar, paste or nails, to the wall in question, and building against it in such manner that it served to exclude the rain, and prevent the access of thieves or intruders of any kind, constituting a part of the enclosure, protecting the tools and property of the tenants, there was an exercise of the right of making this wall one in common, creating a liability in favor of the theretofore exclusive proprietress, if she chose so to construe it, waiving her right of prepayment. *Costa v. Whitehead*, 20 A. 341.

Courts are not at liberty to go beyond the fact of use and cast up accounts, striking a balance between the advantages and disadvantages resulting from the wall to the neighbor who did not at first contribute, and determine, upon such premises, a case like this. The disadvantages or damages, if any, resulting from such a wall, erected in conformity to the law, are matters of *damnum, absque injuria*, not to be demanded or made good, either directly or indirectly. On the other hand, by making any material use whatever of the wall, it is made, if the owner so desires, one in common, independent of the question as to the intrinsic value of this use to the party making it.

The question is presented, that the owners of the soil cannot be held liable for the constructions of their tenants. The Supreme Court has held differently in *Auch v. Labouisse*, 20 La. An. 553, and we think correctly. Whether the adjoining proprietor makes use of the wall for his own personal ends, or permits another to do so for himself, is no concern of the owner. The law accords no such right to strangers, but reserves it exclusively to the proprietor of the adjoining soil, and if the tenant avails himself of it, he does so by authority

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of the lessor, and the liability to the owner is that of the latter. This privilege accorded the tenant, it is to be presumed, enters into the consideration of the lease, and the lessor receives, in rent, compensation therefor. We believe, therefore, that the judgment appealed from is erroneous. The statement of facts fixes the share of defendants, if liable, at \$598 38.

The judgment appealed from is, therefore, reversed, and it is now decreed that plaintiff have judgment against defendants jointly for three hundred and ninety-eight dollars and thirty-eight cents, with costs in both courts.

Rehearing refused.

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No. 110.

MICHAEL VARIOL *v.* MRS. DOHERTY AND THOS. O'BRIEN.

1. Where a lessor has taken the notes of the tenant for the various instalments of rent, he may sue either upon the notes or the lease itself.
2. The surety upon such a lease is not discharged by the mere failure or omission of the landlord to enforce or preserve his privilege.
3. Where the lessee, in such a case, conducted a millinery business in her own name, and in such manner as to constitute her a public merchant, she may execute all contracts necessary to the conduction of such trade, without the special authorization of her husband.
4. The surety upon the lease, as a party to the contract, was estopped from denying the capacity of his principal.
5. Where such surety endorsed the rent notes, he does so as surety, and is not released by failure to protest or notify.

The opinion and decree in this case were delivered by W. E. Murphy, Esq., Judge *ad hoc*, vice McGloin, Judge, recused, having been of counsel.

*Appeal from Fourth District Court. Houston, Judge.*

*Carleton Hunt* for plaintiff.

*J. O. Nixon, Jr.* for defendant, appellant.

MURPHY, Judge *ad hoc*.—This is an appeal from a judgment rendered by the late Fourth District Court in favor of plaintiff and against defendants *in solido*, on five promissory notes, for the sum of \$125 each, drawn by Mrs. Doherty to the order of, and endorsed by, Thomas O'Brien, payable monthly, with interest and costs of protest, etc., which notes were executed by Mrs. Doherty for the rent of a store, No. 132 Canal street, where she carried on a millinery business, and were endorsed by Thomas O'Brien as surety, as fully set forth in the notarial lease executed before Theodore Guyol, Notary, who paraphrased said notes, *ne varietur*, to identify them with said contract of lease.

The defense set out in the answer of Thos. O'Brien, who alone appeals from the judgment rendered in this case, is

1st. That the notes were endorsed by him as surety on a lease, and that if plaintiff has any cause of action, it is on the lease and not on the notes.

2d. That by a subsequent agreement between plaintiff and Mrs. Doherty, the contract of lease was so modified and extended as to release the surety from all responsibility.

3d. That lessor having taken no steps to enforce his privilege against the lessee, that the security was released.

In a motion made for a new trial, appellant makes the further defense that the lease was void, having been made by a married woman without the authorization of her husband. As to the first ground, it is too well settled now to be questioned, that the plaintiff could exercise his right of action, either on the note or the lease, as he thought proper. As to the second ground referred to, a careful examination of the evidence adduced on the trial of this case compels us to say that defendant has failed to sustain that charge. Third. It is also well settled that the surety is not discharged by the lessor's mere omission to enforce or preserve his privilege, it is enough if he do no act to impair it, or to prevent him from subrogating the surety to his rights. *Parker v. Alexander*, 2 A. 188; *Gordon v. Diggs*, 9 A. 422; *Elmore v. Robinson*, 18 A. 652; *Hill & Co. v.*

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Bourcier et al., 29 A. 844; neither does the record reveal any act on the part of plaintiff that would in law release the surety on the lease; and in connection with this it may be remarked that appellant has failed to furnish us with any brief, so as to inform the court what part of the testimony he relies on in support of this allegation, or what law supports his views.

There remains the allegation, that the contract of lease, the consideration for the notes sued on, is void, having been executed by a married woman without the authorization of her husband.

It appears from the evidence, that Mrs. Doherty was carrying on, in this city, in her own name, a millinery business, which constitutes her a public merchant. C. C. Art. 131. As such, she may, without being empowered by her husband, obligate herself in anything relating to her trade, 3 R. 329; 6 R. 291; 14 A. 211, and his authorization to her commercial contracts is presumed whenever he permits her to trade in her own name. C. C. Art. 1786; Brooks v. Wigginton, 14 A. 676. Furthermore, appellant being a party to the contract as surety for the principal, it is a part of his contract that she was capable of contracting. Daniel on Negotiable Instruments, § § 669, 675; Butler v. Slocumb, not yet reported. He is, therefore, estopped from denying it. One cannot do an act which he is at liberty to abstain from, and then screen himself from the legal consequences of that act. Succession of Egana, 18 A. 59; Stephen on Pleading, 239.

The record also contains a bill of exception to the introduction of one of the notes to charge him as endorser, on the ground that the protest is null, having been made on the 4th of July, a *dies non*; this cannot avail him. Sureties who endorse notes are bound without protest or notice of protest. LeBlanc v. Selby, N. R. (1878).

For the reasons before set forth, the judgment of the court *a qua* is confirmed, with costs in both courts.

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Wood Bros. vs. Harbor Tow-boat Company.

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## No. 36.

**B. D. WOOD & BROS. v. HARBOR TOW-BOAT COMPANY.**

1. Under the jurisprudence of Louisiana, *tow-boats* are *common carriers*. 1 La. 354; 24 An. Rep. 166.
2. In an action for loss or damage against such boats, the burden of proof is upon the carriers. C. C. Art. 2754.
3. The pilot or manager of the tug will not, as a defense to an action for damages resulting from negligence, be permitted to show that he was ignorant of the difficulties attendant upon the service which he undertook, and which, though peculiar to the current of the river in certain localities, are shown to be understood and appreciated by all skilled navigators on its waters and along its banks.
4. Where a vessel is moored to the wharf, and another steamer is under way, and so susceptible of control and management, an accident occurs by reason of a collision between the two, the presumptions of liability for the damages sustained are in favor of the moored vessel and against the one under way.
5. Where the usual means adopted for the performance of a particular service have been disregarded by the party undertaking the service, because in his judgment they were not deemed necessary, the court, in the event of a damage, will not undertake to determine whether this exercise of judgment was wise or unwise; he assumed a responsibility, and must be held for the consequences.

*Appeal from the Fourth District Court. Houston, Judge.*

*C. S. Rice* for plaintiffs.

*B. Egan* for appellants.

ROGERS, J.—The plaintiffs were the owners of a coal barge, alleged to be worth \$100, and to have in it, say 1200 barrels of coal, worth \$600. This barge, so laden, was lying, on the morning of July 11th, 1875, in the Mississippi river, nearly opposite Jackson Square. Being desirous of removing it to some other point, the plaintiffs employed the defendant, who was a corporation engaged in the towing business in the harbor of New Orleans and in and about the Mississippi river, to make such removal. The defendant undertook to do so with one of his steam tug-boats, called the “Reliance,” “but by

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and through the carelessness, negligence and incompetency of the officers and crew of said tug-boat, the said Barge was run upon or against the screw of the ocean steamer called the "Knickerbocker," and was thereby damaged and wrecked, so as to cause her at once to sink, with all the coal aforesaid aboard of her, so that said barge and said coal were and are a total loss."

The defendants answered by a general denial of indebtedness for the causes set forth by plaintiffs, admitting, however, that they were employed to perform the towing service alleged; that they reluctantly consented to the employment, as the work was to be done on Sunday, and the barge to be removed was lying in a difficult and dangerous position to be handled by a tug of the size and power of the "Reliance." That the defendants on Sunday morning proceeded with the tug "Reliance" to the place indicated, and found the coal and stage-boat lying alongside a sailing vessel, between the steamers "W. C. Lord" and "Knickerbocker;" that after making repeated attempts to get hold of the coal-boat and get her out from the landing, and when she had finally succeeded in "springing her head off, and was under way getting out," the steamship "Knickerbocker" started her screw and "knocked a hole" in the bottom of the coal-boat about sixteen feet from the stern; the barge was sunk and lost. The defense is further that the tug was commanded by an experienced and skillful officer; that he was guilty of no neglect, carelessness or mismanagement, and that the loss of the boat was due and owing to circumstances over which respondents had no control; in other words, that the loss was occasioned by an "*inevitable accident*."

Under the jurisprudence of Louisiana, tow-boats are common carriers. *Bussey & Co. v. Mississippi Valley Co.*, 24th La. An. Rep., page 166, affirming the doctrine enunciated in *Smith v. Pierce*, 1 La. 354.

In an action for loss or damage against such carriers, the burden of proof is upon the carrier.

"Carriers and watermen are liable for loss or damage of the

things entrusted to their care, *unless they can prove* that such loss or damage has been occasioned by accidental or uncontrollable events." Civil Code, Art. 2754.

The evidence shows that along the shore of the left bank of the Mississippi river, from Esplanade to Julia streets, and to a distance from twenty-five to an hundred yards from shore, the water runs generally "up stream;" this current is changeable; to quote the language of the witnesses, "they (the tow-boats) go up there sometimes, and they think the current is setting up, and it will set right in; it shifts so quick. "It is pretty hard landing by the New York steamship landing; the eddy changes; sometimes it runs up and sometimes down, and sometimes in." This feature of the Mississippi is recognized as established, and of course understood and appreciated by all skilled navigators on its water and along its banks. In about the worst or most difficult part of this eddy or changing current the barge and bridge were moored.

The pilot and manager of the tug-boat was undeniably skilled and experienced as a navigator on the Mississippi river, and for years had devoted his time and services to the towing business. It cannot be disputed, nor would he be permitted to dispute the fact, that he was fully aware of all the difficulties attendant upon the service for which his tug was engaged.

The steamer "Knickerbocker" was fast to the wharf, and lying in the water at her wharf motionless; and to use the words of defendant's witness, "his vessel (the tug) was low in the water, and from his (defendant's) position could have seen the steamer's propeller.

The "Knickerbocker," as all steamers, is in the habit of trying her propellers at stated periods. This was known to defendant's manager, and he states that the propeller had been working before the barge had passed under her quarter. There can be no doubt, if we are to consider presumptions, that we must conclude in favor of the moored steamer and against the tug, under way, and susceptible of control and management. This we say, because defendant contends the

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damage was occasioned by the fault of the officers of the "Knickerbocker," and that the action should have been instituted against that vessel.

The testimony in this case establishes that the usual means adopted in towage, under the circumstances, were not availed of by defendant; that in the exercise of his judgment he did not deem their use necessary; he, therefore, took upon himself a responsibility, wisely or not, is not our purpose to determine.

The accident, and consequent loss, occurred; it is certain he has not shown that he should be excused on the ground of "inevitable accident."

Judgment affirmed.

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No. 94.

## A. LEVY v. FLASH, LEWIS &amp; CO.

1. Where, in a preceding litigation, plaintiff has judgment for his costs, he cannot bring another suit therefor.
2. Where, in a previous suit, plaintiff demanded, *generally*, damages as attorney's fees for an illegal seizure, etc., and the result was adverse to him, and he now claims damages of the same character, on the ground that they were incurred since the filing of the petition, and the rendition of the judgment in the first cause; held, that the first judgment constituted *res adjudicata*.
3. The action for damages for such a seizure accrues at the moment of the levy, and is not postponed until the final determination of the litigation involving its validity.

*Appeal from Sixth District Court. Rightor, Judge.*

D. C. & L. L. Labatt for plaintiff, appellant.

J. O. Nixon, Jr., for defendants.

Henry C. Miller, Esq., member of the Bar, sat in this case, vice McGloin, judge, recused, having been of counsel in the case.

MILLER, judge *ad hoc*.—The plaintiff has a judgment for his costs claimed in his petition. He can enforce it by execution. There cannot be a double judgment.



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The first suit for damages substantially embraced the causes set forth in the present suit. Counsel fees were demanded in the first suit. The petition in that suit refers to the seizure of plaintiff's property. It avers as the grounds of recovery, that defendants prevented the delivery of his property (money and envelope); that under defendant's instructions, express or implied, the sheriff illegally demanded and obtained possession of the property, and these grounds are amplified in the petition. The allegations of damage is that defendants have violated his rights as a citizen, and have caused loss and damage in lawyer's fees, loss of time, anxiety and outrage to his feelings; and to his rights of property. Contrast these allegations with those in the petition in the present suit, and there is no perceptible difference. The causes of action are essentially the same. The liability for counsel fees, without actual payment at the time the present suit for damages, is brought, is enough to entitle the plaintiff to recover for that item. Thus every item for damages alleged here was at issue, and could have been recovered in the previous suit, the final decree in which is the basis of *res judicata* here.

In our opinion the judgment appealed from is correct, and is, therefore, affirmed.

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APPLICATION FOR REHEARING.

MILLER, Judge *ad hoc*.—There can be no doubt that an action of damages for the wrongful seizure of property arises from the fact of seizure, and not from the judgment establishing, or rather recognizing, the title of the injured party. *Edwards v. Turner*, 6th Robinson, 384, and cases collated in *Louque's Digest*, p. 495.

Where the ground of an action for damages is a malicious prosecution, the determination of that prosecution is essential to maintain the action; the end of the prosecution must be averred in the petition. This seems to have been the point passed upon in the opinion in the case annexed to the brief for a rehearing. The court in that case (*Lawler v. Levy*,

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Supreme Court, lately decided) observes, that on the ground set forth, i. e. the publication in the newspapers of the petition against plaintiff, no action could be maintained until the decision of the suit in which the petition was filed. But it is none the less true, that an action for damages for the wrongful seizure of property does not depend upon the final decision of the litigation as to the title to the property, but arises at the date of the unlawful seizure of that property, and the line of decisions to that effect is not disturbed by anything contained in the decision brought to the notice of the court on the application for the rehearing.

The court, recurring to the petition of the present plaintiff, in his previous suit, the judgment in which is pleaded as *res adjudicata* in this, finds that the cause of action was the wrongful seizure of plaintiff's property. It is insisted by the plaintiff that the suit was based upon a confederation to deprive plaintiff from receiving his correspondence, so that the plaintiff's property might be seized afterwards. What the cause was, must be tested by the allegations in the petition in that cause.

The Court cannot restrict the allegations in that petition, without disregarding the significance of the language used in setting out the cause of action, so as to present as the ground of action only the confederation to intercept plaintiff's correspondence. The petition charges that defendant prevented the delivery of the plaintiff's property; that the sheriff illegally demanded and obtained possession of the property of plaintiff; that Flash, Lewis & Co., defendants in this suit, illegally obtained a writ of attachment, and prevented the delivery to plaintiff of his money and envelope, in the hands of the master of the schooner Anita, for delivery to plaintiff; that the sheriff, acting for Flash, Lewis & Co., illegally obtained possession of said valuables, and proceeded to open petitioner's letters, and to seize a portion thereof. Damages are claimed for lawyer's fees, loss of time, anxiety, outrage to his feelings and to plaintiff's rights of property. These allegations must be

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Rogers vs. Goldtwalte.

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deemed to describe a case of damages for wrongful seizure of plaintiff's property; they cannot be limited to a case of a combination to intercept plaintiff's correspondence.

The Court has given the most careful attention to the petitions in this case in the previous suit. Under our system, the pleadings and the judgment must control in the determination of the exception of *res adjudicata*. It is the judgment of the Court that the issues in this cause were made in the previous case, and have been adjudged against the plaintiff in that suit. The issue in the present suit was between the plaintiff and the present parties joined with others.

The rehearing is refused.

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No. 101.W. N. ROGERS *v.* W. F. GOLDTWAITE.

1. This Court will endeavor to observe the established jurisprudence of the State as determined by the Supreme Court.
2. The adoption of the Constitution of 1879 did not grant a right of appeal from judgments rendered by the district courts of New Orleans, and, final, prior to August 1, 1880, when the amount in controversy did not exceed five hundred dollars.
3. The Constitution of 1879 does not declare, even by implication, that it proposed to give new and additional remedies for rights already in existence, or abolish old remedies and substitute new.
4. "Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. We are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to Constitutions." Cooley's Const. Lim. p. 62.

*Appeal from the Fourth District Court. Houston, Judge.*

J. Q. A. Fellows for the motion.

W. W. Handlin contra.

## MOTION TO DISMISS.

ROGERS, J.—Plaintiff instituted an action before the late

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Fourth District Court of this parish, claiming the sum of \$498 57, the value of one half of a party wall, including interest. On 14th January, 1879, a few days subsequent to the filing of the original petition, he filed a supplemental petition, alleging, in reference to a survey of the party wall, "that according to the estimate aforesaid, petitioner claims \$240 35 principal, with legal interest from the date thereof, when payment was demanded, which would amount to something more than \$258 20; *but the overplus of which interest petitioner remits, on account of the delays consequent to appeals in ordinary suits to the Supreme Court.*"

The case was finally adjudged in favor of the defendant on July 1st, 1879.

Notwithstanding the remittitur entered by plea on 14th January, and the fact that the amount originally claimed was less than five hundred dollars, plaintiff obtains an order of suspensive appeal to the Supreme Court, arguing his right to the same on the authority of 25 An. 621.

The Supreme Court disposed of this appeal, and the opinion and decree of that tribunal, on the application of the principles declared in 25 An. 621 to the case then before them, and now under consideration, is final and conclusive. This Court will not undertake to determine for the Supreme Court what opinions it shall render, or how it shall dispose of causes before it. We shall endeavor rather to observe the jurisprudence which its judgment establishes. The cause is now before us under the following circumstances: The appeal from the Fourth District Court was made returnable on the third Monday of November; on the fifth of November an order was granted plaintiff extending return day to December fifth, and subsequent to this date were had the proceedings upon which the Supreme Court pronounced on January 5th, 1880, after the adoption of the Constitution creating this Court and defining its jurisdiction; that, as a consequence, the case should have been transferred, and the decision rendered by the Supreme Court was *coram non judice*. It is true that the alleged money

claim of plaintiff was less than five hundred dollars; it is also true that he judicially declared that he remitted more than one half of the sum to prevent delay consequent on an appeal, but when he was cast in the suit and sought a review by the highest tribunal in the State, on the authority of 25 An. 621, which declares "that the claim presented is not one exclusively for an insignificant sum of money. It is the assertion of a right which concerns the ownership of property and its enjoyment. \* \* \* Whether, in short, a man may enjoy in peace and comfort what he has acquired by toil; \* \* it may, indeed, involve the entire value of the property upon which the wall or fence is built;" the plaintiff submitted himself to the only court then existing competent to grant him relief from the judgment of the lower court; that tribunal determined that the want of jurisdiction was apparent from the record; "the value of property to which the walls belong is not in controversy, nor is the title to that property in any way disputed."

From this results naturally that the only questions that could arise in considering the controversy are fixed by the amount claimed in the petition to the judge of the lower court; that amount, after the remittitur, was \$240 35.

On the 1st of July, 1879, when the judgment was definitive, the district courts were vested with exclusive jurisdiction of all amounts not exceeding five hundred dollars. Art. 83 Const. 1868. The judgment, therefore, could not be appealed from.

The adoption of the Constitution of 1879, on January 1st, 1880, did not grant or permit appeals from judgments which had become final, like the one before us.

The authority, Cooley's Const. Lim. p, 398 (note 1), is not applicable; the law was not changed *pending the proceedings*; *the proceedings had merged into a final judgment* when the change in the law occurred. The Constitution of 1880 does not declare, not even by implication, that it proposed to give new and additional remedies for rights already in existence, or abolish old remedies and substitute new. "We shall venture

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also," (Cooley's Const. Lim. p. 62) "to express the opinion that a constitution is to be construed to operate prospectively only, unless its terms clearly imply that it should have a retrospective effect. \* \* \* Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. We are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions."

The motion is granted. The appeal herein dismissed.

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No. 17.

*Court of Appeals, Fourth Circuit, Parish of East Baton Rouge.*

**C. D. FAVROT v. J. W. BATES, Sheriff.**

1. A party to the appeal who himself makes a statement in his brief of the agreement between the parties to the suit, restricting the issues to be decided by the Court to well defined points, is bound by that agreement, and the appellate court is restricted to the consideration of these issues.
2. The judgment in the hypothecary action, and the recording thereof in the mortgage book, have no effect after the extinguishment of the original judgment either by payment or prescription.
3. The written acknowledgment of the judgment debtor by placing the claim on which the judgment is based on his schedule in bankruptcy, may have the effect of keeping alive the debt evidenced by the judgment, but not the judgment itself. 31 La. A. 397.

*Appeal from Seventeenth Judicial District, East Baton Rouge.*

*H. N. Sherburne, Judge.*

*C. D. Favrot*, in person.

*Herron & Beale*, for defendant, appellee.

The opinion of the Court was delivered by S. P. GREAVES, Esq., judge *ad hoc*, *vice* McVay, Judge, recused, having sat in the case as District Judge.

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Favrot vs. Bates, Sheriff.

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GREAVES, Judge *ad hoc*.—In this case the appellate court is relieved from the consideration of many of the points raised by the pleadings by the following statement contained in the brief furnished us by the appellant :

“By agreement of the attorneys, the injunction was tried and restricted to two points.

“James A. Payne takes the ground that the judgment of Mrs. Young against N. K. Knox, although it may be a personal claim against Knox, has ceased to be an encumbrance on the property in controversy, and that for the want of registry she should, therefore, be enjoined forever from prosecuting her claim against said property to the prejudice of James A. Payne.

“And the attorney for Mrs. Young pretends that James A. Payne has no mortgage on the aforesaid property, because the first judgment, that of Payne *v.* Young, has prescribed and not been revived, and that the second judgment, that of Payne *v.* Knox, although recorded previous to the peremption of the first inscription, and while the first judgment was alive, cannot be operated without the existence of the first judgment.”

By the terms of the above agreement, as stated by the plaintiff himself, we are bound to conclude that the plea of prescription, filed by him on the 22d November, 1879, against the original judgment of Mrs. Young, was waived, or at least not to be urged on the trial of the issue involved, the plaintiff relying upon his inscription against Knox and the want of inscription of the judgment of Mrs. Young against Knox.

On the other hand, by this agreement Mrs. Young is expressly permitted to urge her plea of prescription against the original judgment of Payne against Young.

Under this view of the agreement, as stated by the plaintiff, it is unnecessary to consider what might have been the fate of plaintiff's plea of prescription if urged on the trial. Mrs. Young might possibly have shown an interruption of prescription against her judgment, or that her judgment was not prescribed.

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Favrot vs. Bates, Sheriff.

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That the plea of prescription of Mrs. Young was well taken, and that the executory effect of the judgment against Knox in the hypothecary action was dependent on the existence of the judgment in the case of *Payne v. Young*, we have no doubt.

The plaintiff admits that if the judgment of *Payne* had prescribed after service of citation upon Knox in the hypothecary action, but before judgment, as decided in 31 La. An. 395, the judicial mortgage and the hypothecary action authorized by the mortgage would have both perished, but seems to contend that, having obtained judgment against Knox and caused his judgment to be inscribed before the judgment against Young had prescribed, that neither Knox nor the creditors of Young could set up the extinguishment of the mortgage claim by the prescription of the judgment on which it is based, but that the plea is a personal one to Young or his heirs.

We cannot assent to this position. It is equally true, that a debt may be discharged by prescription as well as by payment, La. Civil Code, Arts. 3457, 3459; and if a mortgage claim is extinguished by payment it would be absurd to claim that a judgment *in rem* can be enforced against the third possessor for a repetition of payment.

We have, however, no doubt that mortgage creditors, and all others having an interest in the extinguishment of a claim by prescription, may plead it. La. Civil Code, Art. 3466.

In order to show an interruption of prescription of the judgment in *Payne v. Young*, plaintiff offered in evidence the schedule in bankruptcy, signed by Jacob Young, from which it appears that Young placed thereon James A. Payne as a creditor for \$300 by note for merchandise, and offered to prove by parol evidence that said note was merged into a judgment of which plaintiff is transferee. The court refused to allow said parol evidence for the purpose of taking the judgment out of prescription, and the bill of exceptions taken by plaintiff to the ruling of the court is before us.

Whatever might have been the effect of the signing of the



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schedule by Young, had the claim of Payne been placed thereon as a judgment and mortgage claim, the lower court was justified in refusing to admit parol evidence beyond what was contained in the written act, which was offered in evidence for the purpose of interrupting prescription of the original judgment; but even had the facts, sought to be proved, been shown by competent evidence, under the concurring opinion of Justice Spencer, in 31 La. An. 397, the written acknowledgment of the debtor might keep alive the debt evidenced by the judgment, but not the judgment itself.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court appealed from be affirmed, with costs in both courts.

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## No. 85.

THOMAS SEWELL, Agent, v. JOHN P. JACOBS *et al.*

1. Appellant must bring up a complete record of appeal, or in due season at the time of, or before the argument, suggest a diminution thereof, otherwise the appeal will be dismissed.
2. This Court cannot order the completion of a record, after the submission of the case upon its merits.
3. Attorneys are but the agents of the litigants they represent, and it is the *principal* who is charged with the knowledge of the history of his cause, and the fault or negligence of such principal is not excused by the fact that his counsel were not participants therein.

*Appeal from the Fifth District Court, Parish of Orleans.**Rogers, Judge.**Breaux & Hall*, for plaintiff and appellant.*W. E. Murphy*, for defendants and appellees.

The opinion of the Court was rendered by S. S. CARLISLE, Judge *ad hoc*, vice Rogers, judge, recused, having decided the case in the first instance.

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Sewell, Agent, vs. Jacobs et al.

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CARLISLE, Judge *ad hoc*.—This cause came up for hearing in this Court on the day fixed and was regularly submitted.

An application for a writ of *certiorari* was made, after submission of the case, by appellant to perfect the record, which was found to contain none of the testimony adduced in the lower court.

This case involves an amount exceeding five hundred dollars, and in the absence of any bill of exceptions or assignment of errors, the evidence upon which the judgment appealed from was rendered should be placed before us before it can be considered.

The record is clearly defective in this respect, and the question is presented whether the fault is imputable to the appellant.

We think it is. The appeal was granted, on motion, July 3, 1880, and made returnable to this Court on the 8th day of November following, a sufficiently long interval in which to have discovered the loss of the testimony, and taken steps to have found it, or to have replaced it in the manner pointed out by law.

If the loss of the testimony had not been discovered before the return day, it certainly became known to appellant then, as on that day, under rule No. 5 of this Court, he filed a detailed list of all the pleadings, evidence and documents produced on the trial of the cause in the lower court, and he then became aware of the defective character of the record. Yet he took no steps even then to remedy it. His application for a *certiorari* comes too late.

As we said in the case of *Becker v. Quick et al.*, 1 McGloin, 111:

“If the record be defective through the fault of appellant, and he makes no timely effort to perfect it, the appeal must be dismissed.”

It was the duty of appellant to bring up a complete record, or in proper time suggest a diminution of the record in order that

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it should be corrected, if possible, and the trial be proceeded with. 27 La. An. 105; 18 La. An. 180.

It is unnecessary to consider here the question as to whether the motion to dismiss was urged in time.

We laid down in *Grivot v. Waples*, No. 38, recently decided, that even though no motion to dismiss had been urged, we should yet, *ex proprio motu*, dismiss an appeal where appellant brings up a transcript or record of appeal which is clearly defective, and where no timely effort is made to cure its defects, and in this view we are sustained by the jurisprudence of this State. 8 La. An. 433; 18 La. An. 229; 27 La. An. 105.

Let the appeal, therefore, be dismissed at the cost of the appellant.

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#### ON APPLICATION FOR REHEARING.

MCGLOIN, J.—We are asked to set aside the decree refusing a *certiorari* and dismissing the appeal in this case, on the ground that the present counsel of appellant was not aware of the fact, until the filing of the motion to dismiss, that the record was incomplete, and hence they have not been negligent.

The application in this case for a writ of *certiorari* to complete the record was not made until after the cause was duly fixed for trial in, and submitted upon the merits to, this Court. At the same time appellee presented and submitted the motion to dismiss.

Under articles 896, 897 and 898 C. P., it does not seem that the Court has the authority, *after the time of argument*, to issue an order for the completion of a record. Nor is there any wise or just purpose to be served in extending grace beyond this period, for surely, if an appellant does not discover the deficiencies, *even when trying his case*, they must be diminutions which are unusually well concealed, or else there must be such inattention on his part as to preclude his claiming that he is faultless in the premises.

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In this case, had the application for a *certiorari* been made at the time the motion to dismiss was filed, and before or at the moment the case was submitted, we probably, under the circumstances disclosed, might have exercised in appellant's favor the *discretion* accorded us by C. P. 898. We do not, however, feel authorized, or inclined, to grant relief upon an application so tardy as that made in this instance. Nor does the law, in our opinion, justify the assumption that because an appellant changes counsel, and does not take the precaution to furnish the later one with all information material to the case, or does not put him in a way to obtain it, that he may escape the consequences of his negligence. Attorneys are but agents of the litigants they represent, and it is the *principal* who is charged with knowledge of the history of his case, and the fault or negligence of such principal is not excused by the fact that his counsel were not participants therein.

Even if disposed to follow, as regulating the practice of this Court, the precedents set in *Holbrook v. Holbrook*, 32 La. An. 15, and in *Jas. Henry West v. P. E. Davis and Mrs. Henry Kuntz*, No. 7242, Supreme Court, not yet reported, but to be found in Opinion Book 51, page 94, if these go to the extent of declaring that a motion to dismiss, even touching matters which the Court will notice *ex proprio motu*, will be denied if filed more than three days after the record is lodged in this Court, they would not be applicable to this case. The precedents mentioned expressly declare that the failure of appellee to move to dismiss within three days does not preclude the Court from dismissing the appeal, *ex propria motu*, for the causes under consideration, if the latter are discovered *when examining the case upon its merits*. We have already stated that this controversy was submitted upon the motion to dismiss *and upon the merits* at the same time.

A rehearing is, therefore, refused.

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Danner & Co. vs. Otis.

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No. 112.

A. C. DANNER &amp; Co. v. HENRY OTIS.

1. A clause in a contract of sale, that the measurement shall be by a person named, is obligatory, in default of fraud or error alleged, such as would justify rescission.
2. A simple averment in the answer to a suit upon such a written contract that the measurement is not correct, according to a particular rule or method not specified in the agreement, will not warrant the introduction of evidence to contradict, annul or amplify the contract.

*Appeal from Division B. Houston, Judge.**T. M. Gill*, for plaintiff.*W. L. Benedict*, for appellant.

ROGERS, J.—This is an action on a balance of account due plaintiff. On May 27, 1880, defendant delivered to plaintiff the following acknowledgment:

"I hereby acknowledge purchase from you of a raft of black walnut logs, now lying in Dymond's eddy, at \$27 50 per M (thousand) feet, as per measurement of J. M. Oriol; I to take possession of said raft within three days; meantime said raft to remain at your risk. Payment for the above raft to be made within ninety days from date."

On the 27th August, following, plaintiff prepared and furnished his bill for 170 walnut logs, containing 73,893 feet, at \$27 50 per M, sold May 27th—\$2032 05; to which interest from August 27 to October 8th, was added, as on that day defendant paid on account \$1707 34, leaving the balance \$344 13, the amount sued for.

On the trial, defendant propounded to plaintiff's witnesses the following question:

"By what rule of admeasurement was the lumber purchased by defendant from plaintiffs agreed to be made?" This was objected to, on the ground that the letter of 27th May estopped the defendant from all inquiry relative thereto,

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Danner & Co. vs. Otis.

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and that no oral testimony could be received against the said letter. The court sustained the exception, on the grounds that the letter referred to a particular person whose measurement was accepted as correct; and, further, it was not competent to traverse the correctness of that admeasurement as accepted by the letter, in the absence of allegations of fraud or error.

We see no error in this ruling. It appears from the statement of fact upon which this point was decided, that a witness for plaintiffs, named Anderson, testified that the account annexed to the plaintiffs' petition was correct; that he identified the letter dated 27th May, 1880, written by defendant, and identified a certificate of admeasurement made by J. M. Oriol, dated May 21, 1880. These were offered in evidence without objection.

The answer of defendant admits substantially the allegations of plaintiffs' petition, and adds that the measurement of Oriol, agreed to be made, was to be according to the Scribner rule. That under said rule he received and paid for the entire amount of lumber according to said rule. These allegations are not sufficient to permit so great a modification of the written agreement between the parties. It was competent to designate a particular individual to make the measurement, and it is competent for the parties to agree to be bound by such measurement, in default of fraud or error, such as could justify rescission, duly alleged.\*

There was no attempt to dispute the report made by Oriol; but defendant seeks to establish for him a particular manner and method in making the measurement, which would produce a result more in accord with plaintiffs' theory as to how the service should have been performed.

This method should have been stipulated for. But it is very evident from the statement in the bill, which contains the letter of acceptance and the report of Oriol, that defendant

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\*See *Leebriok v. Lyter*, 3 *Watts & Seargeant* (Pa.) 366; *Monongahela Nav. Co. v. Fenton*, 4 *W. & S.* 205; *Ennis v. O'Connor*; 3 *Harris & Johns* (Md.) 163.—Reporter

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understood that he bought 170 walnut logs, according to Oriol's measurement, which had been certified to six days prior to the sale. And, as appears from the pleadings, when he paid \$1707 24 he paid it on account of 73,893 feet at \$27 50 per thousand, the exact quantity reported by Oriol.

It is not necessary to consider the other points raised in the bill; they present, in a barely modified condition, the facts and principles just considered.

Judgment affirmed.

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No 111.

WIDOW J. H. SMITH *v.* HENRY BARKEMEYER, Tutor.

1. On appeal upon questions of law, in a suit to annul a judgment, the question of the jurisdiction of the inferior court in trying and determining the original controversy will not be noticed by this tribunal, unless presented in the first instance to the court *a qua*.
2. Questions of fact cannot be assigned as error in an appeal upon questions of law alone.
3. In all such appeals, the findings of the judge *a quo*, upon questions of fact, are conclusive.
4. Want of finality in a judgment is no cause of nullity, unless it be shown that its execution "would be against good conscience," and that the applicant "could not have availed himself of it in a former suit, or was prevented by fraud or accident." C. P. 606, 607, 608.
5. Where a judgment decrees the payment of future rents at a fixed price, so long as defendant occupies the leased premises, or the board of a minor, so long as a plaintiff maintains him, the amount due at any particular subsequent period may be fixed by rule.
6. Service of such a rule is good if made upon the attorney of record of B, although the judgment is against "B, tutor," where B has no individual interest, and the caption of the rule served bore the correct designation of parties, and it appears by the record that the attorney "for defendant" was present at the trial of the rule.

*Appeal from Civil District Court, Division A. Tissot, Judge.*

*McGloin & Nixon* for plaintiff.

*A. J. Lewis* for appellant.

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Smith vs. Barkemeyer, Tutor.

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The opinion of the Court was delivered by H. H. HALL, Esq., judge *ad hoc*, *vice* McGloin, Judge, recused, having been of counsel.

HALL, Judge *ad hoc*.—On the 12th of June, 1876, the judge of the Second District Court, for the parish of Orleans, in this proceeding, rendered judgment in favor of Mrs. Smith, plaintiff, and against Henry Barkemeyer, tutor of the minor John Henry Smith, for \$193, with legal interest from May 19th, 1875, and further, for "ten dollars additional for every month that she (Mrs. Smith) may continue, with the consent of said tutor, to give board and lodging to said minor; the whole payable in due course of administration."

On the 23d of June, 1877, the same judge rendered judgment on a rule in favor of and against the same parties "for the sum of ten dollars per month from 1st of May, 1875, to the 20th of February, 1877, with interest thereon from judicial demand."

On the 2d of September, 1880, this cause having, under the Constitution of 1879, been transferred to the Civil District Court, No. 30 of its docket, plaintiff caused a writ of *fieri facias* to issue on said judgments.

On the 16th of September, 1880, Barkemeyer, as tutor, filed in these same proceedings a petition asking that the sheriff be enjoined from proceeding under said execution, and further praying that such judgments be decreed null and void, for the reasons alleged in his said petition.

On the 13th of December, 1880, judgment was rendered on the issues raised in said petition, perpetuating the injunction, and in other respects, dismissing the suit of said tutor.

From this judgment said tutor has taken this appeal. The judgments sought to be annulled aggregates less than \$500; consequently, the appeal comes to this Court solely on questions of law.

No bill of exception to the ruling of the lower court has been taken; but in this Court have been filed an "assignment of errors," and a "peremptory exception."



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Smith vs. Barkemeyer, Tutor.

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We will first consider the exception. The ground urged by it, viz: "Want of jurisdiction *ratione materiæ* in the late Second District Court" was not raised in the pleadings below, but is made for the first time in this Court.

We cannot consider it. The only question properly before us is the correctness *vel non*, on questions of law, of the judgment of the lower court. That court could not possibly be held to have erred in deciding a question of law never presented to it.

The cases cited, 21 La. An. 478, 5 Martin, N. S. 10, 22 La. An. 81 (C. P. 92), were all cases in which the Supreme Court was itself vested with jurisdiction to examine whether or not the lower court had jurisdiction of the suits in question.

Had, in the case at bar, the appeal come to this Court from the *original* judgment, the issues presented would have been similar to those in the cases above cited, and *then* this Court might well have found, *ex proprio motu*, that the Second District Court was without jurisdiction to render a judgment against a minor on a moneyed demand. C. P. 608-9.

But the original suit is not before this Court. The only issue before it is that raised by the tutor, who attacks the original judgment for grounds of nullity which he alleges. The judge *a quo* decided that the grounds alleged were not sufficient to annul the judgments, and the tutor has appealed, averring that the judge erred in so deciding. We have merely to decide whether he did or did not so err, and *not* to decide what should have been his judgment had other issues been presented to him.

We will, therefore, not consider the question of law raised by the peremptory exception.

Nor can we consider the points raised, Nos. 1, 2 and 4 of the assignment of errors, and grounds Nos. 1, 2, 3 and 6 of the petition for nullity, because they treat of questions of fact, over which, in this case, the jurisdiction of this Court does not extend. Thus, in deciding the case, the judge *a quo* has *finally* decided all questions of fact, and we must presume

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that, in his consideration of the cause, he found that, as matters of fact, the minor's capital was not touched.

We, therefore, will consider nothing but assigned errors of law patent upon the face of the papers.

We find no defect in the judgment of June 12th, 1876, in so far as it decrees the payment of \$193.

There is a citation regularly addressed to and served on the dative tutor, issue joined by him and judgment rendered after trial contradictorily.

Nor do we understand that counsel for the appellant assigns any error in the judgment as to the \$193. His petitions for nullity, Nos. 4 and 5, and his assignment of errors, No. 3, allege error in the proceeding by rule, which formed the basis of the judgment of June 23d, 1879.

The errors therein complained of are twofold, viz:

1. That the proceedings by rule should have been by petition and citation.
2. That acceptance of service of said rule by the attorney of record was not binding on the minor.

The original judgment for \$193, which is formal as to citation and parties, decrees the payment of ten dollars additional per month for such time as Mrs. Smith may continue to give board and lodging to the minor.

The judgment of 23d June, 1877, on the rule, merely purports to liquidate the amount decreed under the original judgment.

Is that original judgment, in so far as it awards ten dollars per month for an unfixed period, formal, or is it defective for uncertainty?

In *Foucher v. Leeds*, 2 Louisiana R., p. 403, the Supreme Court said: "But the Judge, in our opinion, erred in giving judgment for the rent beyond the date of it; for we are ignorant of any manner in which the officer who issued the execution, as he who carries it into effect, may ascertain whether the defendant held possession beyond the date of the judgment, or for how long."

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But later, in *Kellogg v. McMillan and Wife*, 9 La. An., p. 225, the Supreme Court, in the face of the *Foucher* case, which was cited by counsel, affirmed the judgment of the lower court, which had decreed the recovery of \$25 per month from June 9th, 1852, "until the plaintiff is put into possession."

Conceding the jurisprudence of the State to be unsettled on this point, by reason of the conflict of these two only decisions on this particular subject, what would be the effect of a judgment imperfect by reason of its uncertainty? Grant that part of the judgment be informal by reason of its not being *finally* decisive of the issues between the parties, is the fact of its being wanting in *finality* a ground of nullity? It is not one of the grounds specified in the Code of Practice, Arts. 606, 607, 608. It is true that the action of nullity is not abstractly limited to the causes specified in these articles, but *in this case* it is practically, because when other causes are invoked, the applicant "must show that it would be against good conscience to execute the judgment; that he could not have availed himself of it in a former suit, or was prevented by fraud or accident." 3 La. An. 646; 6 La. An. 799. And as *these are questions of fact*, we cannot permit ourselves to ascertain whether or not the evidence of them exists in this record.

Therefore, assuming the *non-finality* of the original judgment herein, this Court would not annul it but would remand the case for further proceedings. *Peet v. Whitmore*, 14 La. An. 408; C. P. 57. But these further proceedings have been had in the rule and judgment of 23d June, 1877.

Were those proceedings regular? Appellant assigns that they should have been by citation and petition. The suit was so begun, and judgment was rendered 12th June, 1876, for every thing covered by this rule. That judgment lacked finality, in that the number of instalments of rent was not liquidated. Had a new suit been brought, we think the plea of *res adjudicata* would have lain. Parties proceeded properly by rule filed in the original suit, to fix contradictorily the amount

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due under that judgment. Counsel say that the acceptance of that rule by the attorney of record was not binding, because the rule was taken on "Hy. Barkemeyer," and not on "Hy. Barkemeyer, *tutor*," and because service was accepted by "A. J. Villeré, attorney for Barkemeyer." This rule bears in the caption the proper title of the suit as against "Henry Barkemeyer, *tutor*." Hy. Barkemeyer, *individually*, does not appear in the suit as a party in interest, and Mr. Villeré is the counsel of record for the *tutor*. But apart from this, in the judgment on the rule, it appears that on the trial thereof, in the cause "Widow J. H. Smith *v.* Henry Barkemeyer, *tutor*," there was present in court "A. J. Villeré, Esq., *for defendant*." If this service and appearance were made in an original proceeding begun by citation against the minor, we should hold them to be insufficient; but on a rule to liquidate a judgment previously rendered after due citation, we hold that the appearance in court of the counsel of record of the minor is sufficient.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be affirmed, and that appellant pay the costs of this appeal.

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No. 120.

STATE OF LOUISIANA *ex rel.* C. C. HARTWELL *v.* ALLEN JUMEL, Auditor.

1. Where the law has vested a discretion in any executive officer of the State, the courts will not control him in its exercise.
2. Where, however, the discretion has been lawfully exercised by the legislative department, and there remains to such executive officer only the obligation of complying with its mandates, the courts will, if necessary, compel his obedience.
3. In the former case, interference by the courts would be an usurpation by one agent of the people of the functions specially confided to another.
4. In the latter, the courts interfere simply to prevent a subordinate from usurping the functions of superior authority, and substituting his discretion for that of the legislature, to whom the people had confided it.

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5. The Revised Statutes of Louisiana, sections 176, 179, 181, 183, 186, *et seq.*, are, as to the class of claims coming within the purview of Art. 1, Miscellaneous Ordinances, Constitution of Louisiana of 1879, abrogated by the latter.
6. That constitutional provision preserves only such claims as are evidenced by Auditor's warrants, and restricts the application of the uncollected revenues for the years named to the satisfaction of such demands.
7. By its terms, even such Auditor's warrants are of no effect until examined and approved by the Auditor, Treasurer and Attorney General.
8. Even Auditor's warrants so approved, cannot be satisfied out of the treasury as such, but must be either paid in for back taxes of the years indicated or funded into Baby Bonds.
9. By the Constitution of 1868, the debts of each year were restricted for their payment to the revenues thereof. The State, therefore, was bound only to apply faithfully such revenues to such claims so far as they went.
10. The constitutional provision in question, was a scheme by the State for the fair distribution of the uncollected revenues of former years, amongst the legitimate creditors of the State, for corresponding periods.
11. Where the State, as the principal, commands the Auditor, as its agent, to make a particular distribution of the funds in its public treasury, any proceeding intended to compel him to violate such instructions is an action against the State, which, by reason of its sovereignty, will not lie.

*Appeal from Division E, Civil District Court. Lazarus, Judge.*

*Braughn, Buck & Dinkelspeil* for relator.

*J. C. Egan*, Attorney General, for respondent.

MCGLOIN, J.—Plaintiff seeks, by mandamus, to compel the Auditor to warrant upon the Treasurer of the State for payment of two vouchers issued to him by the committee on contingent expenses of the House of Representatives during the session of 1875. He alleges that by Act 17 of 1875, an appropriation was duly made to pay claims such as those he holds.

The defense is, that the matters sought to be affected by the mandamus prayed for are not within the scope of judicial control; and that the Constitution of 1879, by article 1 of its

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Miscellaneous Ordinances, has appropriated all funds in the State treasury to be derived from payments of taxes and licenses due prior to January 1st, 1879, to pay the interest upon the five-dollar bonds provided for in said article, and to create a sinking fund to redeem the same.

The learned judge *a quo*, in an elaborate and learned opinion, reviewing the various authorities bearing upon the important issues involved in this controversy, maintained the defense, and denied the writ. The ruling is founded upon two propositions of law, both of which may be considered as now firmly established in American jurisprudence.

1st. Courts of justice have neither the right nor the power to control executive officers of the State in the performance of such duties as are by law confided to their discretion.

2d. That a proceeding, such as that now before the Court, is in reality a proceeding against the State, which, as a sovereign, is beyond judicial control.

I.

With regard to the first of these principles, the distinction is drawn between duties discretionary and those merely ministerial. As to the first, the courts are powerless to interfere; but where the latter alone are concerned, they will issue their process. *Kendall v. U. S.*, 12 Peters, 612.

The wisdom and necessity of this distinction are patent. The fundamental idea of the American theory of government is, that the three departments, legislative, executive, and judicial, collectively or separately, do not constitute the sovereignty itself. The people themselves, in the aggregate, are sovereign, and the various departments are merely agents, exercising as such whatever portion of the governmental power that may be assigned to them. This they hold, under the Constitution, as by a written procuration; and beyond what its letter, or evident intent confers, they are without power. When, therefore, a particular duty is imposed upon one department, that duty is absolutely excluded from the province of the others.

The management and control of the finances of the State has by the Constitution been confided to the executive, under the control, with certain limitations, of the Legislature; and it is, therefore, excluded from amongst the things which are within the judicial province. So, where, by the fundamental law, or by statutory action, the management of any branch of the State's finances, or of other matters of an executive character, is left to the judgment and discretion of a particular officer, as to such matters, he is the exclusive agent of the people; and it would be usurpation for any other special agent of the same sovereign principal to assume authority in that connection.

Where, however, the Constitution has itself expressly regulated particular matters, or has confided to the Legislature the right so to do, and there has been definite legislation disposing of the same and directing a particular officer to execute its mandate, such officer is not the agent of the people for the purpose of passing in judgment upon and determining the matter, and he has no discretion whatever, but must obey.

In such cases the courts intervene to compel obedience, and they are not substituting their own judgment for that of others to whom the people have confided the right of determination. On the contrary, as interpreters and enforcers of the law, they are rendering effective the determination of the real mandatory, and preventing subordinate officers from substituting their individual discretion for that of the Legislature, or Convention, as the case may be, where solely the discretion should lie. *Louisiana College v. State Treasurer*, 2 La. 395; *State ex rel. Mahan v. Dubuclet*, 22 La. An. 602; *State ex rel. DeMonasterio v. Shaw*, 23 La. An. 790; *State ex rel. Sam Smith & Co. v. Board of Liquidators*, 23 La. An. 388; *State ex rel. Barnett v. Warmoth*, 23 La. An. 76; *Mossy v. Harris*, 25 La. An. 624; *State ex rel. Macauley v. Clinton*, 27 La. An. 430; *State ex rel. Longstreet v. Johnson*, 28 La. An. 932; *State ex rel. Miss. Valley Nav. Co. v. Warmoth*, 24 La. An. 352; *Oliver v. Governor*, 22 La. An. 1; *State ex rel. Hilman v. Dubuclet*, 24 La. An. 16; *State ex rel. Gourdon v. Dubuclet*, 28 La. An.

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86; *Marbury v. Madison*, 1 Cranch 137; 19 Johnson, 259; 4 Wall. 500; *Kendal v. U. S.* 12 Pet. 612; *Decatur v. Paulding*, 14 Pet. 497; *Brashear v. Mason*, 6 How. 93; *Reeside v. Walker*, 11 How. 290; *Liquidators v. McComb*, 2 Otto, 540.

These principles were applied by the learned judge *a quo* in connection with sections 176, 179, 181, 183, 186, *et seq.*, Revised Statutes of 1870, requiring the Auditor to examine and determine upon the validity of all claims against the State, and to warrant only for those which were valid, granting to the holders of claims rejected by him an appeal to the Legislature. It seems, however, to us, that the effect of article 1, Miscellaneous Ordinances of the Constitution of 1879, practically eliminates this question from the case. That constitutional provision was adopted as a scheme for the redemption of the floating debt of the State due prior to January, 1879. It did not, however, embrace all claims against the State, but only those which were contracted since January 1st, 1875, with what might remain due for salaries of constitutional officers for the year 1875. The holders of obligations, such as were covered by it, could apply the same to the payment of taxes and licenses due prior to January 1st, 1879, or, at their option, fund them in bonds of the denomination of five dollars. All funds in the treasury collected, or to be collected for any taxes or licenses due prior to January 1st, 1879, were set aside as a special fund to pay interest and principal of such bonds.

A careful study of this constitutional legislation will show that the Auditor has, in this connection, no longer the discretion accorded him by the Revised Statutes, as referred to, but that there are three separate reasons why the prayer of relator should be refused.

1st. The article of the Miscellaneous Ordinances of the Constitution of 1879, restricts its provisions to such claims alone as are evidenced by *Auditor's warrants*. The relator holds no such warrants, but his claims are exhibited to us simply in the shape of certificates of indebtedness, signed by the chairman of the committee on contingent expenses of the House of Rep-



representatives, approved by the Speaker, during the session of 1875.

2d. By the constitutional provisions already referred to, the Auditor, Treasurer and Attorney General, are required to examine and approve all claims, even when already evidenced by Auditor's warrants, before they can be used for payment of back taxes, or funding, as described. The Auditor, therefore, separately, has no authority to pass upon the validity of these claims; nor can he or any other State officer be compelled or permitted to treat them as valid until they have been subjected to the examination and received the approval of the three designated officers of the State.

3d. Even were they Auditor's warrants duly approved by the officers named, the plaintiff's claims could not be paid as such. The outstanding warrants covered by the constitutional provision, when approved, can only be received for back taxes or exchanged for bonds, which are to run until January 1st, 1886.

It is very evident, therefore, that the demand of the relator cannot prevail, unless these clear and emphatic provisions of the Constitution of the State be disregarded. In determining whether we have the right so to do, two questions naturally suggest themselves. The first is whether the State has the right, intrinsically, to adopt the course it has pursued, and next, whether, even if it has done wrong to the plaintiff, he has any legal remedy.

#### I.

According to Constitution of 1868, as amended in 1874, which Constitution was the fundamental law of this State in 1875, and entered into relator's contract, if a contract, strictly speaking, he had, his sole recourse was upon the revenues of the year during which his debt arose or was created. If this special fund was inadequate, he had no further claim upon the State. When, therefore, in 1879, the State found it necessary to provide for the just distribution of the unpaid revenues of prior years to the outstanding floating debt of the State, it had the

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right to adopt such rules as it considered for that purpose most equitable and effective. If in its opinion all claimants could not be paid, it was fair and reasonable to make the discrimination against State claims which, although in existence for years, did not have the Auditor's approval as directed by the Revised Statutes, and against which there was consequently a strong presumption, and in favor of such as had upon them this stamp of legitimacy. See *State ex rel. Collens v. Burke*, 32 La. An. 1218.

## II.

Although the relator has made the Auditor respondent in this proceeding, it is very evident that the State is really the party in interest. It is its funds that are sought to be reached. It is a claim against it that is sought to be enforced. Individually, the Auditor has not the slightest interest in the controversy. The intervention of the Court is asked not to compel him to comply with what his principal, the State, has ordered him to do, in which event the interference of the Court would be for the Commonwealth and against him. On the contrary, it is sought to compel him to disobey the express mandates of his principal, and, therefore, it is against the rights and interests of the latter that the process of the Court is asked to be levelled. *State ex rel. Macauley v. Clinton*, 27 La. An. 430; *Case v. Terrell*, 11 Wall. 203. To entertain such litigations would be effectually accomplishing by indirect means what it is universally conceded could not be reached directly. *U. S. v. McLemore*, 4 How. 288. This would be a shameful circumvention of the letter and spirit of the law, to which courts of justice should never lend themselves. *Reoside v. Walker*, 11 How. 290; 2 Wood's C. C. 21; *State ex rel. Hart v. E. A. Burke*, Treasurer, lately decided by the Supreme Court of Louisiana. Judgment affirmed.

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ROGERS, J. I am not now prepared to determine the questions as to the effect of the constitutional provision in so far as it excludes the claim of the relator. While assenting to the

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general propositions of law, and the deductions made therefrom by my colleague, I am of opinion that the conclusion is sufficiently supported by the authority of State *ex rel.* Collens v. Burke, Treasurer, 32 La. An. p. 1218. I have specially investigated, therefore, none of the other questions involved in the case.

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No. 115.

O. P. ALFORD v. SILVERE TIBLIER.

1. Where parties definitely agree in their contract, to submit all differences which may arise thereunder to arbitration, this stipulation is binding, and either party appealing to the courts, before submitting to or tendering arbitration, will be dismissed.
2. Such a defense, however, is waived where the party sued appears and presents his defenses, without specially pleading this objection.
3. A party tendering compliance of his obligation under a contract, requiring payment of money, need not actually exhibit the money if he is, in fact, in a condition to perform what he offers to do.
4. Where a party is unable to comply with his contract, no default against him is necessary.
5. Where, upon demand for compliance, a party refuses absolutely, or seeks to impose upon his compliance conditions foreign to the contract, no further putting in default is necessary.
6. Although a term is ordinarily presumed to be stipulated for the benefit of the debtor, yet there may be cases when it is for the benefit of debtor and creditor, or even exclusively for the creditor alone. In the latter event, the creditor may waive it, and put his debtor *in mora* before it has elapsed, provided the debtor suffer no injury by the waiver.
7. Where a purchase is made, and the vendor fails to deliver, the measure of damage is the difference between the contract price and that of the market upon the date when, by the terms of the agreement, delivery should have been made.
8. Where a purchaser stipulated for delivery in New Orleans, it matters not what eventual disposition he intended making of the property. The market price at New Orleans must govern, and not that in Kentucky, where the mules in this case might have been sent, had they been delivered.

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9. Where the contract is for a specified number or amount, the purchaser cannot be forced to sever his purchase, and accept only a portion thereof.

*Appeal from the Civil District Court. Houston, Judge.*

*B. R. Forman and J. O. Nixon, Jr., for plaintiff.*

*F. D. Seghers and Cotton & Levy for defendant, appellant.*

MCGLOIN, J.—Plaintiff sues for damages for violation of a contract for sale and delivery of 100 Mexican mules, in two lots, of 50 each. The contract was written. The first lot of mules, amongst other qualities, were to be in height not less than 13½ hands. The others were to be colt mules, sound, and in good flesh and condition, between two years past and three years of age, well shaped, and, according to age, of a better class than the first. The price fixed was \$35 for the colt mules, and \$45 for the others. The damages are set at \$10 a head upon both lots. The contract concludes with a stipulation binding the parties in case of difficulty to submit to arbitration, one arbitrator to be selected by each, and they to select the umpire, if necessary. Tiblier also bound himself "to keep and feed said mules for three days, before their delivery, after their arrival in this city."

Defendant urges that the agreement to arbitrate was valid and binding, and that, without previous tender of arbitration, plaintiff could not appeal to the courts. The attempt of plaintiff to prove such tender has not, in our opinion, been successful. It is, on the other hand, contended that an agreement to submit to arbitration is revocable at any time before award, citing *Davis v. Maxwell*, 27 Ga. 368; *King v. Howard*, 27 Mo. 21; *Tobey v. Bristol*, 3 Story 800; *Marsh v. Parker*, 20 Vt. 198. To the same effect are *McGunn v. Hawlin*, 29 Mich. 476; *Goodwine v. Miller*, 32 Ind. 419; *Brown v. Welker & Gost*, 1 Coldw. (Tenn.) 197; 40 N. J. Law (11 Vroom), 288; *Robertson v. McNeil*, 12 Wend. 578. These cases follow the English authorities, as cited in *Tobey v. Bristol*. They are, however, in conflict with *Snodgrass v. Gavit*, 28 Penn. St. 221; *Leebrick v.*

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Lyter, 3 Watts & Seargeant (Pa.) 365; McGeehan v. Duffield, 5 Barr. (Pa.) 497; Ennis v. O'Connor, 3 Harris & John (Md.), 163; Monongahela Nav. Co. v. Fenton, 4 W. & S., 205; Berry v. Carter, 19 Kansas 135. In our courts, in Driggs v. Morgan, 2 La. An. 151, the Court held such a stipulation to be a contract, and in Lallande v. Bouny, 13 La. 462, it speaks of arbitration as an amicable tribunal, and intimates very strongly that the exception in that case, presenting the very question now being discussed, would have been maintained had not the arbitrators named refused to proceed.

The English authorities cited by Judge Story, in Tobey v. Bristol, follow Vynor's case, 8 Co. R. 81, which latter rests upon the proposition that a man may not render irrevocable a warrant or authority, which is in its nature countermandable, as if a party should create another his agent, or should declare his testament to be immutable, by doing which he could not preclude himself from revoking it. This, it seems to us, was taking at the outset for granted the very question which was at issue. The law does not, except when the public necessity or general good demands it, restrict the liberty of contract; and parties may, by agreement, make that immutable which the letter or plain spirit of the law does not declare shall remain revocable. In the execution of a testament there is no mutuality, no determination and fixing of conflicting rights or interests, and, in fact, nothing to place it upon the same footing as a solemn contract executed between capable parties. So, likewise, where a principal may usually revoke an agency, he cannot do so where the agency is coupled with an adverse interest in the agent, or in third persons.

The Supreme Court of the United States, in Newcomb v. Wood, 97 U. S. 583, as does Judge Story, in Tobey v. Bristol, expressly declares that there is in such conventions nothing contrary to public policy.

So, in many of the authorities declaring that such a submission is revocable, where the parties had executed bonds with a penalty to abide the action of arbitrators, it has been deter-

mined that the bond or penalty may be enforced against the party receding. *King v. Joseph*, 5 Taunton 452; *Brown v. Leavitt*, 26 Maine 256; *Craftsbury v. Hill*, 28 Vt. 763. Even without such special bond, it has been held that mutual promises to arbitrate are sufficient considerations, one for the other, and that the party receding without justification is liable for resulting damages. *Pond v. Harris*, 113 Mass. 118.

In fact, all the authorities are uniform, that once an award has been found, the right of revocation is certainly at an end.

From all of this, it clearly appears that such contracts are not in any manner in contravention of the law or of public policy. Why, therefore, should parties be exempted from abiding by such stipulations any more than they would be where their conventions cover any other lawful subject? Where lies the wisdom or logic of fixing a line, upon one side whereof the contract shall prevail, according to its letter, while upon the other it shall not? In fact, by what right may courts of law, or those whose equitable intervention is like ours, not entirely a matter of their own discretion, place beyond the pale of enforcement contracts of this particular kind, although their subject-matter be in no manner illegal?

Judge Story, in *Tobey v. Bristol*, seeks to meet these objections, by declaring that while parties who have abided by the agreement, until the award, should be held, that, until such award, they should not be compelled, against their will, to submit their interests to the determination of a tribunal which had not powers and facilities, such as these lodged in the regular courts, for arriving at the truth, and administering full justice. In the first place, the Civil Code of Louisiana, Art. 3115, supplies this deficiency, as do the laws of many other States of the Union. But, if they did not, there is no more reason, the consideration of consent or agreement being eliminated, for compelling a party to abide by, and render effective, what is, or may be, considered as an accomplished injustice resulting from this want of power, than to compel him to submit himself, in the first place, to the risk thereof.

Furthermore, parties should take all these matters into due consideration before contracting; and courts, in default of legislative intervention, and in matters of strictly individual concern, are not at liberty to force their wisdom upon the citizen. When the law thus intervenes for the protection of minors, interdicts, married women, etc., it leaves others to protect and promote their own interests as they deem best.

Such an objection, however, it seems to us, is in the nature of a plea to the jurisdiction of the Court *ratione personæ*, or, at all events, it constitutes one of those matters which may be waived; and we are of opinion that where, as in this case, without any reservation of the plea, the party cited appears and presents his defenses to the court before which he is sued, there is such a waiver.

Defendant next urges that he has not been placed *in mora*. It appears that plaintiff sent a representative to demand of defendant delivery of the mules, and to tender compliance upon the part of plaintiff with the contract. We do not agree with defendant's counsel, that in such a case the party so applying, although fully prepared, and so announcing, to comply with his part, is compelled in all cases to actually exhibit his money. *Fuentes v. Caballero*, 1 La. An. 27; *Bowman v. Ware*, 18 La. 599. Furthermore, it appears that there were not a sufficient number of Mexican mules, besides those in question, accessible to defendant, with which to comply with his contract, and if they did not meet its requirements, it was not in his power to perform. Under such circumstances, default would be a vain ceremony, to the idle performance whereof parties should not be held. *Moreau v. Chauvin*, 8 Rob. 61; *Marchesseau v. Chaffe*, 4 La. An. 241; *Garcia v. Champonier*, 8 La. 522. Still further, the weight of the evidence establishes the fact that when the demand was made, defendant declared that he would do nothing towards settling this transaction until plaintiff adjusted a preceding matter, relative to a purchase of ponies, entirely distinct and disconnected with the contract in question. This defendant had

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not the right to do, and his answer was tantamount to a refusal to comply, rendering further tender or default unnecessary. *Lynch v. Postlethwaite*, 7 Mart. 218; *Mathews v. Wilson*, 5 La. An. 692; *Nashville Co. v. Ganalk*, 18 L. 510; *Abels v. Glover*, 15 La. An. 24; *Garcia v. Champonier*, 8 La. 522.

Defendant calls our attention to the last clause of the contract, as we have quoted it above, contending that the stipulated three days must be presumed to have been for his benefit, and that the demand made before their expiration was premature, and could not serve as a placing *in mora*. It is true that a term is ordinarily presumed to have been stipulated in favor of the debtor. C. C. 2053. But it may be stipulated for the mutual advantage of both, or for the exclusive advantage of the creditor. In the latter case, he is not compelled to avail himself of it, if his waiver can inflict no injury upon the debtor. The clause in question we consider, if at all in the nature of a mere term, as one inserted for the benefit of Alford, the waiver whereof would be to the advantage of, instead of detrimental to, defendant.

The measure of damages, in such a case, is the difference between the price stated in the contract and the market price, at the time when delivery should have been made if fixed; or if not, at the date of putting in default. *Brown v. Duplantier*, 1 Martin, N. S., 321; *Steff v. Nugent*, 5 Rob. 217; *Fuentes v. Caballero*, 1 La. An. 27; *Porter v. Barrow*, 3 La. An. 140; *Marchesseau v. Chaffe*, 4 La. Ann. 24; *Fuller v. Cowell*, 8 La. An. 136; *Foster v. Baer*, 6 La. An. 442; *Foster v. Baer*, 7 La. An. 613.

Defendant sought to prove that plaintiff intended to forward these mules to Kentucky, to be there disposed of, or pastured until later in the year, and contends that the latter could only recover up to the market price in Kentucky, which had not been proven. The private intentions of plaintiff, not forming part of the contract, either by expression or implication, did not enter into it, and created no obligation on the part of the one, or rights upon the part of the other. Alford



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would have been at liberty to pursue, abandon, or modify his intention, and it would have been no concern of the defendants. We do not consider the rule stated as affected in any manner by this circumstance.

A careful examination of the merits satisfies us, as it did the judge *a quo*, that the aged mules did not come up to the standard fixed by the contract, but that, on the contrary, a number of them were in height less than 13½ hands high. The burden of proof was, in this connection, clearly upon defendant, who was bound affirmatively to show that the mules were of the stipulated character. Instead of this requirement being complied with by defendant, plaintiff has, on the contrary, established the negative, at least so far as the aged mules are concerned. We think that the evidence supports the finding of the court *a quo*, fixing the loss upon these at \$10 per head, or \$500 upon the lot. We are asked to accord damages at a like rate upon the other lot, but the judge *a quo* did not find this branch of the case established, plaintiff not having clearly shown the market price of such mules. The evidence upon this point leads us to the same conclusion.

Defendant finally urges that this contract was in its nature divisible, and that plaintiff should have taken such of the mules as were of the required height, and cannot recover damages upon them, citing 4 La. An. 430. This case was an action under C. O. 2520 *et seq.*, to avoid a sale, and involved the application of Art. 2540 (2518 C. O.). These provisions of the law do not govern the question of delivery or payment under contracts which are not sought to be avoided or rescinded. To such a case, C. O. articles 2108 *et seq.*, are applicable. Of these, article 2111 is as follows: "An obligation susceptible of division *must be executed between the creditor and the debtor as though it were indivisible*. The divisibility is applicable only among the heirs, who can demand of the debtor, or who are liable to pay it, only the part which they hold or for which they are liable as representing the creditor, or the debtor."

Judgment affirmed.

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Worman vs. Miller.

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## No. 107.

BERNARD WORMAN *v.* WIDOW GEORGE MILLER. M. POELMAN, Intervenor.

1. The uncontradicted affidavit of the plaintiff, showing that the amount involved is such as to give this Court jurisdiction, will prevent the dismissal of the appeal on the ground of the want of such amount, even though the affidavit were not filed until after the trial of the cause had commenced in this Court.
2. If the record shows no motion of the plaintiff to strike out the intervention of a third person, and no objection on his part to the admission of evidence to prove the demand set up in the intervention, he is estopped from objecting to the adjudication of the interventional demand.
3. A tax sale, of property situated within the city of New Orleans, which has not been advertised in the official journal three times within ten consecutive days before the sale, is void.
4. Where the absolute nullity of a tax sale appears on the face of the tax collector's deed, the sale may be attacked collaterally.

*Appeal from Fourth District Court, Parish of Orleans. Lynch, Judge.*

*Wynne Rogers* for plaintiff, appellant.

*Kennard, Howe & Prentiss* for defendant and intervenors.

The opinion of the Court was delivered by Percy Roberts, Esq., judge *ad hoc*, *vice* Rogers, judge, recused, having been of counsel.

ROBERTS, Judge *ad hoc*.—The essential facts of this case appear to be as follows:

Certain immovable property, situated in the city of New Orleans, and specifically described in the pleadings, was sold at public auction by A. S. Badger, tax collector, and adjudicated to the plaintiff herein for the price of \$87  $\frac{20}{100}$ .

The sale was made under provisions of the Act of the Legislature, No. 47, of the year 1873, to satisfy a debt due the State on account of unpaid taxes.

On the basis of the title passed to him in virtue of the sale,

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the plaintiff brought this suit, and demanded to be put in possession and recognized as the owner of the property.

After the answer of defendant was filed, Dr. M. Poelman intervened and claimed that he was the owner of a portion of the property in dispute, and held a mortgage on the other portion, and united with the defendant, Mrs. Miller, in asking that the sale to the plaintiff be declared invalid.

Two preliminary questions present themselves for determination before considering the case on the merits.

First. Has this Court jurisdiction?

It appears in evidence that sometime before the tax sale the property sold for the sum of \$1300, and at the tax sale sold for only \$87  $\frac{20}{100}$ .

Counsel for defendant and intervenor moved to dismiss the appeal, on the ground that whether the price for which the property sold before or at the tax sale be adopted as its value, this Court is without jurisdiction. That if \$1300 be adopted as its value, then that this case is appealable to the Supreme Court; and if \$87  $\frac{20}{100}$  be adopted, then that the case is appealable to no court at all.

We are saved the necessity of passing on this dilemma by the uncontradicted affidavit of the plaintiff, filed after the trial of the case had commenced in this Court, showing that he has an interest at issue in the suit that will give this Court jurisdiction. The motion to dismiss is, therefore, overruled.

See *Burke v. Wall*, 29 La. An. 38.

Second. The plaintiff objects to an adjudication by this Court as to the claims of intervenor, on the ground that he had no right to come into the case by way of intervention.

Whatever right the plaintiff may have had, if any, to urge such an objection has been waived by him. The record shows no motion to strike out the intervention, and no objection to the introduction of any evidence offered in support of the interventional demand. Such action involved a consent that the interventional demand should be passed on, and thereby estopped the plaintiff from objecting to a judgment on that

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demand. See 16 La. An. 273; 17 La. An. 37; 20 La. An. 241; 30 La. An. 398; 31 La. An. 839.

The counsel of defendant and intervenor maintain the invalidity of the tax sale on several grounds, all of which embrace questions of much interest, and all of which were discussed in the oral argument with research and ability on both sides. The conclusion we have reached on one of the points made by the defendant, makes it unnecessary for us to consider any other.

The point referred to is, that the advertisement of the sale by the tax collector was not made three times within ten days. The evidence is that the first advertisement appeared in the official journal on the 5th of March, 1875, and the third advertisement on the 20th of March, 1875, the day of the sale. The law under which the adjudication was made specifically prescribes that it shall take place "*after advertising three times, within ten days, in the official journal,*" etc.

The attorney for the plaintiff contends that the sole purpose contemplated by the law is to compel the advertisement to be made for the space of at least ten clear days before the sale, and, therefore, if the first insertion in the official journal appears the ten clear days before, it is immaterial whether the second and third insertions appear within ten days after the first insertion or not.

In support of his proposition he quotes the decision of the Supreme Court in the case of Renshaw, Cammack & Co. v. Imboden, 31 La. An. 661. An inspection of that decision shows that the only point settled by it was that "*there must be ten clear days between the first appearance of the notice and the sale.*"

But the question whether the *three* appearances of notice required by the law should be *within a space of ten consecutive days* was not raised or passed on in that case. The decision in it, therefore, cannot be invoked as determinative of this case.

The language of the law under which this tax sale was made

is explicit and free from ambiguity. It says in so many words that the sale must be made "after advertising three times *within ten days.*"

The question then is, is the tax collector, or are *we*, permitted to strike out ten and substitute any greater number? In other words, is the officer charged with the execution, or the officer charged with the interpretation, of any law, permitted to disregard the letter of the law when the letter is plain, intelligible and mandatory? Such authority does not exist, even when the law under construction is one of beneficence, where a generous latitude of interpretation is permissible.

It clearly cannot be claimed to exist in respect of the law now under consideration. On the contrary, the immemorial rule is that "in forced sales for taxes every formality of the law must be strictly complied with under the pain of nullity." See 6 Martin, N. S. 348; 7 La. 250; 10 La. 283; 13 La. 205; 4 La. An. 248; 6 La. An. 542; 8 La. An. 19; 10 La. An. 329; 15 La. An. 15; 29 La. An. 508; 30 La. An. 175, 298, 871; 32 La. An. 912; Schwartz v. Huér, 1 McGloin, 81.

From the express words of the law, it seems clear that the purpose of the Legislature was to deprive the tax collector of all discretion as to the term within which the three appearances of the notice of sale should be made in the official journal. The collector in this case, however, chose to exercise that discretion, and advertised the sale three times within fifteen instead of ten days, thereby, in our judgment, rendering the sale absolutely null and void. See 32 La. An. 704. See, also, Strafford, Ex., v. Twitchell, No. 7729, 33 La. An.

The plaintiff further maintains that however defective the sale may be, he holds under a deed from the collector; that such a deed under the Constitution of 1868 is *prima facie* evidence of a valid sale, and hence, that his title, founded on that sale, cannot be collaterally attacked.

The conclusive answer to that proposition is, that the deed itself, on its face, discloses the absolute nullity of the sale. In

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such a case it is not necessary to institute a direct suit to annul. The sale may be attacked collaterally by any party in interest. 31 La. An. 663.

It is, therefore, adjudged and decreed that the judgment of the lower court be amended as follows:

Let there be judgment in favor of the heirs of the intervenor, Dr. M. Poelman, who have been made formal parties to the suit, as prayed for in the petition of intervention filed herein by said Poelman. As thus amended, the judgment of the lower court is affirmed, the appellants to pay costs in both courts.

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No. 71.

JEAN M. TUPEY v. W. P. HARPER, Civil Sheriff.

1. Individuals may renounce what the law has established in their favor, when thereby the rights of others are not affected and where the renunciation is not contrary to public good. C. C. Art. 11.
2. A renunciation, however, by an insolvent debtor in favor of a particular creditor, dispensing with any of the forms of law, by which the value of his property sold under execution is diminished, is contrary to good morals.
3. A sheriff, aware of the insolvency of the debtor, who executes an order of sale, waiving the formalities and delays of advertisement, although such sale is consented to by the seizing creditor, is liable in damages to a creditor who has suffered by such a proceeding.
4. The price brought by the property so sold will not be taken as a standard of its value.
5. The court in such cases will give full damages, but not more than have been actually sustained.

*Appeal from the Fifth District Court. Cullom, Judge.*

*W. E. Murphy* for plaintiff.

*W. S. Benedict* for appellant.

ROGERS, J.—The defendant appeals from a judgment rendered against him for the sum of one thousand dollars, resulting from an action brought by plaintiff to recover damages for the seizure and sale of certain movable property upon which

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he had the right of pledge. One Joseph Miramon, an embarrassed and insolvent debtor, had been condemned in a suit brought by the Tennessee Chair Manufacturing Company, and by virtue of a writ of *fi. fa.* issued in the suit, the furniture pledged by him to plaintiff was seized, and with his, Miramon's, consent, delays were waived and the property sold after only one day's advertisement. Tupery at first declined to permit the seizure, demanding that he should be paid the amount due him, and for which he held the goods in pledge. He was finally compelled to submit, and the goods were taken to the sheriff's warehouse. This seizure was made on the 7th of April. On the 8th or 9th, being the day or two after, the sheriff was again notified by plaintiff, through his counsel, that he would file proceedings at once as the pledgee of the property. On the 10th of April, the property was sold after one day's advertisement, made by consent of Miramon and the Tennessee Chair Manufacturing Company. On the 11th, the funds realized from the sale were turned over to the plaintiff, the Chair Company; no intimation was given to Tupery, though it is indisputable that the sheriff was aware of the nature and extent of his claim. While we do not desire to dispute the proposition that the delays provided by law for the advertisement was made for the benefit of the defendant, and that, therefore, these delays may be waived, we must consider other provisions of law equally as sacramental. Individuals may renounce what the law has established in their favor, when the renunciation does not affect the rights of others and is not contrary to public good. C. C. Art. 11.

It is shown that Miramon was insolvent, and to the knowledge of the sheriff. The sheriff must have known that the consent of a debtor in insolvent circumstances to dispense with any of the forms of law in the sale of his property under execution, by which its value is diminished, is a renunciation contrary to good morals. 1 La. An. 297-340.

There is no doubt the haste which characterized the seizure and sale in this case diminished the value of the articles

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sold, and we do not consider, therefore, the amount of this sale as a standard of the value, we prefer to take the testimony of plaintiff.

We consider the defendant liable for the damages sustained. 15 La. An. 491; 20 La. An. 570. But we do not consider plaintiff entitled to recover more than the amount of his pledge; we think defendant actually sustained damage to that amount. 15 La. An. 163. Plaintiff admits to have received, prior to the seizure, the sum of forty-two dollars, which must be deducted. We think there should be recognized the following items of the demand: One hundred and seventy-four dollars with legal interest from July 21, 1873, to April 7, 1874, and for one hundred and seventy dollars, with like interest from July 22, 1873, to April 7, 1874; for cartage, \$6; storage, \$28; insurance, \$26; these items are allowed under Art. 3167, C. C.

The judgment of the lower court is amended so as to read, that there be judgment in favor of J. M. Tupery, against the defendant, Mrs. Mary Lelia Montan, widow and testamentary executrix of W. P. Harper, for the sum of four hundred and four dollars; that on one hundred and seventy-four dollars of said amount plaintiff recover legal interest from July 21, 1873, to April 7, 1874; that on the sum of one hundred and seventy dollars thereof legal interest from July 22, 1873, to April 7, 1874; and that from the judgment thus rendered, be deducted the sum of forty-two dollars; that as thus amended, the judgment be affirmed, appellee paying costs of appeal, defendant those of the lower court.

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*Court of Appeals, Third Circuit, Parish of St. Landry.*

JAMES M. HOUSTON *et al.* v. VINCENT BOAGNI.

1. Parol evidence is admissible to establish a contract with a broker, fixing a rate of compensation for securing a purchaser for real estate.
2. Where the owner of property agrees to pay a particular sum to such a broker for securing a purchase at a fixed price, and such a purchaser



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- is secured by the broker, the compensation of the latter is earned, and his claim cannot be defeated by the refusal of the owner to perfect the sale.
3. The failure of a broker to pay his State licenses for years preceding that of the transaction in question, could not affect his rights.
  4. When the law imposing licenses fixes a penalty, it is the only one which can be enforced against delinquents.
  5. Where the law does not declare that failure to pay State licenses shall bar the delinquent from enforcing judicially his claims for services, this penalty will not be imposed.
  6. The only penalty fixed by law for non-payment of licenses of 1880, was that the delinquent might be prevented, by process of law, from transacting business.

*Appeal from Thirteenth Judicial District Court, Parish of St. Landry. Hudspeth, Judge.*

*J. L. Tansey* for plaintiff.

*Lewis & Brother* for defendant, appellant.

Plaintiff alleged that defendant agreed to pay him \$1000 for securing a purchaser, at a stated price, for his plantation; that he secured such purchaser and introduced him to defendant, who thereupon refused to execute title to the property.

The defendant excepted, on the ground that plaintiffs had not paid their State licenses as brokers for the years 1878, 1879 and 1880, and could not, in consequence of such delinquency, appear in court demanding compensation for services as brokers. This exception being overruled, the general denial was plead. During trial defendant excepted to the refusal of the lower court to receive evidence that plaintiffs had failed to pay their State licenses for the years 1878 and 1879, and again to the admission of certain depositions establishing the contract sued upon.

MOORE, Judge, after stating pleadings and facts.—The ruling of the Court (upon the first bill) is based upon the ground that the evidence is irrelevant. We are of the same

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opinion. The contract sued on was made in the year 1880, and not in either 1878 or 1879.

The next bill is to the ruling of the court overruling defendant's objections to the admissibility of the depositions of Louis and Oscar Philips, offered in evidence by plaintiff. The objections were; 1st, that parol evidence to prove authority to sell real estate is inadmissible; 2d, that parol evidence is inadmissible to prove any contract or agreement relative to immovables. The ruling was correct, and for the reasons given by the judge *a quo*.

We do not deem it necessary to notice the other bills of exception found in the record, except the one applicable to the overruling by the court of defendant's exception to plaintiffs' right of action, grounded upon their failure to procure a license for 1880. The ruling, we think, was correct. If plaintiff was obliged to take out any license at all, it was under the law of 1880, No. 119 of the Acts of the General Assembly for that year, approved April 10th, 1880. This law does not prescribe as a penalty for carrying on business without a license that the person so offending shall not sue for the recovery of fees or compensation due him for services rendered. The only penalty provided for is that mentioned in the seventeenth section thereof; and that is the stopping of the business or occupation carried on by the delinquent, to be enforced by legal process. This act repeals all other laws or parts of laws inconsistent or in conflict with it: therefore, no other or different penalties established by any other act of the Legislature, passed at any time anterior to the passage of this one, could be enforced against persons violating the same.

But it is shown by the testimony of the tax collector that he could not have given plaintiffs a license for 1880, at the time the contract was made between them and defendant and the services by them had been rendered. It would have been a vain thing, therefore, for them to have applied for a license.

The evidence adduced on the trial satisfies us that plaintiffs performed faithfully their part of the contract, and that de-

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Martel vs. Smith et als.

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defendant has failed and refused to perform his part thereof; that the failure to sell the plantation, for which a purchaser had been secured, was due to defendant's refusal to make the title he had promised to such purchaser, and not to any act of plaintiffs.

Plaintiffs put defendant in default when they brought the purchaser to him, and the purchaser signified his readiness to take the property upon the terms and conditions agreed upon. There was no necessity for plaintiffs making a tender of any money to defendant for the purpose of putting him in default.

All the way through this transaction the defendant seems to have had it well understood that the sale must bring him \$4000 net. He and his son, in their testimony, say that it was understood between him and plaintiff that defendant was to bear none of the expenses incident to the perfecting of title by a purchase from defendant of certain mortgage notes on the property and their foreclosure by the purchaser. The evidence establishes the probable expense of foreclosing said mortgage at about \$300, not including sheriff's costs and costs of advertisement. This matter of the purchase of the mortgage notes and their foreclosure on the property seems to have been a modification of the original propositions of defendant, agreed to by the purchaser, in presence of plaintiff. We do not think the verdict of the jury and the judgment of the lower court should be disturbed.

Judgment affirmed.

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*Court of Appeals, Third Circuit, Parish of St. Landry.*

**B. A. MARTEL, Dative Testamentary Executor, v. LEONARD  
J. SMITH et als.**

1. Where, in a suit originally beyond the jurisdiction of this Court, plaintiff, by supplemental petition, without objection, changes the issues and the nature of the case, and in its new aspect the controversy is less than \$1000, this Court will entertain an appeal therein.

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Martel vs. Smith et als.

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2. Thus, where the holder of a twelve-months bond, secured by mortgage on certain property worth more than \$1000, sues to annul a tax sale of the property, whereat one of the parties to said bond acquired title, and subsequently plaintiff, by supplemental petition, and without objection, demands simply the enforcement of his bond, which is for less than that sum, this Court has appellate jurisdiction.
3. Where the purchaser of property at a forced sale, upon twelve months' credit, executes his bond with mortgage upon the property; held, that it was the duty of such purchaser to keep down the taxes and prevent the sale thereof for taxes.
4. Having failed so to do, and the property being sold for such taxes and bought in by one of the debtors on the bond, the tax title of such debtor cannot prevent the creditor holding the bond from enforcing it against the property.

*Appeal from Thirteenth Judicial District Court, Parish of St. Landry. Hudspeth, Judge.*

*Lewis & Brother* for plaintiff.

*J. N. Ogden* for defendant, appellant.

Defendant, L. J. Smith, purchased at sheriff's sale, upon twelve months credit, a certain plantation. He executed for balance of price, above costs, charges, etc., his bond at twelve months, according to law, for \$704 40, with the other defendant, Elbert Gantt, as surety. Before the maturity of the bond, Smith allowed the property to be sold for taxes, and Gantt became the purchaser. The original petition set up fraud and collusion between defendants; that Gantt was the real purchaser at the first sale, Smith being merely a party interposed, and that the second sale was the result of a conspiracy to defraud plaintiff.

The prayer was for nullity of the tax sale to Gantt. Subsequently, by supplemental petition, filed with consent of defendants, plaintiff demanded the enforcement of his bond and mortgage upon the land. The defendants plead the general denial and set up the tax title as an extinguishment of the bond and mortgage.

IRION, J., after stating pleadings and facts.—If the issues in this case were confined to those presented in the

original petition, we would be compelled to dismiss the appeal for want of jurisdiction. The amended petition, filed without objection, presents a totally different issue. We are asked therein to recognize the validity of the special mortgage and vendor's privilege, reserved to secure payment of the bond and to enforce them against the property, for the purchase of which the bond was executed. The bond being for an amount less than \$1000, is within the jurisdiction of this Court, and we clearly have the right to consider any question arising out of its enforcement against the property.

The question for us to determine, and which is the only one we can consider is, did the purchase by Gantt at the tax sale cancel the bond and the mortgage given to secure it?

The case of *Renshaw v. Stafford*, 30 La. An. 853, was similar in many respects to the one now before this Court. Renshaw was a mortgage creditor of L. A. Stafford, of whose estate Geo. W. Stafford was the executor. Taxes amounting to \$4000 accumulated upon the property which belonged to the estate of L. A. Stafford, and the plantation was finally seized and sold by the collector for the payment. The property was sold in lots, some of which were adjudicated to Renshaw and some to G. W. Stafford, sufficient in the aggregate to cover the taxes. Stafford declined to comply with his bids, and the collector, upon that pretext, refused to make a deed to Renshaw. The property was again offered for sale and adjudicated to the State. It was then sold by the State to Mrs. Sarah C. Stafford, the widow of L. A. Stafford. In that case the Court said: "To our minds, Mrs. Stafford was the mere *alter ego* of Geo. W. Stafford in these transactions. Good conscience forbids that the executor and widow in community of the deceased, under the circumstances of this case, should be permitted to take advantage of their own wrong and thus deprive creditors of the estate of its effects. It was the duty of the executor, as also of the widow in community—they were under the same legal obligation—to keep down these taxes and to preserve the property for the creditors. The transaction can

only be regarded as a payment of the taxes; a redemption of the property for the benefit of the estate of L. A. Stafford."

A number of authorities are quoted by the Court, one of which is from Cooley on Taxation, pages 342, 346, who says: "Some persons, from their relation to the land, or to the tax, are precluded from becoming purchasers. So the mortgagor, remaining in possession of the land, owes it to the mortgagee to keep down the taxes, and the law would justly be chargeable with connivance at fraud and dishonesty, if a mortgagor might allow the taxes to become delinquent and then discharge them by a purchase which would, at the same time, cut off the mortgage. There is a general principle, applicable to such cases, that a purchase made by one whose duty it was to pay the taxes, shall operate as a payment only; he shall acquire no rights as against a third party by a neglect of duty which he owed such party. The principle is universal, and is so entirely reasonable as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance."

If we apply these principles to the facts as shown in this case, it will not be difficult to arrive at a proper judgment. Gantt and Smith are both bound *in solido* upon the bond. Execution might have issued on the bond against Gantt alone, and any property he owned could be seized to satisfy the execution. There is nothing to prevent the plaintiff from seizing this very property, as the property of Gantt, or as the property of Smith, to satisfy the bond, provided the bond has not been extinguished by the tax sale to Gantt.

Under the circumstances of this case, we think there was a strong moral obligation resting upon Gantt to pay the taxes, if any were due upon this property. The evidence shows that it was Gantt who attended the sheriff's sale; that Smith was not present; that Gantt was the bidder, and that it was he who told the sheriff to make out the title to Smith. Several days after the sale, Gantt and Smith went together to the sheriff's office and signed the bond. It was Gantt who exe-

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cuted a counter letter to Thoms for the redemption of the property, on payment of the bond; and it was Gantt who conducted all the negotiations with Thoms with regard to the redemption of the property. When the property was seized for taxes and Martel offered to pay them and stop the sale, it was Gantt who requested him not to do so, because it would interfere with his arrangements with Thoms, and it was Gantt who then purchased the property.

Under all these circumstances we think it clear that Gantt, from his relation both to the land and the tax, is precluded from acquiring such a title at tax sale as can be opposed to the mortgage creditor who offered to pay the tax and stop the sale, but desisted at the request of Gantt, to enable him (Gantt) to arrange his affairs with Thoms, the former owner. It is immaterial, therefore, whether the land belongs to Gantt or Smith. They are both bound *in solido* upon the bond, and as Gantt cannot be considered as a third party making a *bona fide* purchase of the property, the bond remains valid and the plaintiff has the right to enforce his special mortgage against the property to satisfy his bond.

Judgment of District Court affirmed, in so far as it orders the enforcement of the bond, with its special mortgage and vendor's privilege against the property in question.

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No. 25.MARGARET LACEY *v.* NICHOLAS FERGUSON.

1. Articles 988, 989, 990 and 999 C. C., must be considered in connection with article 1422 *et seq.*
2. The article 999 C. C., holding a person for its debts who disposes of the property of a succession without authorization of the judge, is founded upon the reason of the articles preceding; that he has done some act necessarily indicating the intention to accept and which he had no right to do but in his quality as heir.
3. Heirs who have not made an inventory, although bound for the debts of the succession to which they are called, are not bound *in solido*, but only for their virile portions. C. C. 1425.

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4. An act of piety or humanity towards one's relations, is not considered an acceptance of the succession.
5. When the succession will not defray the expenses of administration, the heir need not have it administered. 4 La. An. 329.

*Appeal from the Fifth District Court. Cullom, Judge.*

*C. H. Lavillebeuve* for appellant.

*T. H. Kennedy* and *Henry Chiappella* for defendant.

ROGERS, J.—The plaintiff, alleging that she was a creditor of Catharine Cavanaugh, who died in this city in October, 1873, it is claimed that the defendant, Nicholas Ferguson, was at the time of the decease, her nearest living relative; that as soon as Mrs. Cavanaugh's death became known, he proceeded, wrongfully and unlawfully, to remove her effects and dispose of the same for his own use and benefit; that he accepted unconditionally the succession of his said sister by appropriating all the property and effects of which the same was composed; that he tortiously intermeddled in the succession and rendered himself personally liable for the debts of decedent.

It is evident that this action does not arise under section 3685 Rev. Stat., or C. C., article 1100, which apply to strangers, not heirs; the liability, if any, in this case arises under other provisions of our Code.

Without discussing the verity of plaintiff's claim against the deceased, Catharine Cavanaugh, the facts in the record show that she was a woman quite without means until aided by the plaintiff, who appears to have been a hired servant; that Mrs. Cavanaugh had opened a small grocery on the corner of Canal and Marais streets; the establishment consisted of a store in the front and a small partitioned room in the rear which was used as a bed room. According to all the witnesses, this room was miserably furnished; one of plaintiff's witnesses, testifying to the removal of the effects, says, "one man carried the bed, while another carried a trunk."

It appears that on Saturday, the 4th of October, the constable of a justice's court had, according to his own statement,



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sold out everything in the store. The son of plaintiff intimates in his testimony, that Mrs. Cavanaugh, in collusion with the constable's keeper, concealed some valuable articles in a trunk in the rear room. This, however, we cannot consider. The statements are entirely too indefinite to substantiate so grave an offense against an officer of the law. During the night of the day following the sale (Sunday), Mrs. Cavanaugh died, but her death was not known until the following noon, when the police and the coroner were notified. Word was sent to her brother, the defendant, who, according to his own statement and that of the police, was not permitted to enter the house until the arrival of the coroner. That officer having ascertained that death resulted from congestion of the brain, turned over the body to defendant for burial, and in the evening it was buried. It appears that what effects were left in this house were taken to the house of defendant, and left on the banquette in front of his door and in his stable, whether by his orders or not is not clear. We are satisfied, however, that they were without any appreciable value.

The amount of the debt claimed is six hundred dollars, with interest from September, 1873, and for this sum the District Judge gave plaintiff a judgment. Before considering the law applicable to these facts, it is proper to state that the decedent was, as shown by the testimony, insolvent, and that there survived her as heirs, besides the defendant, a mother and three sisters.

Article 999 (993) C. C., which holds a person responsible for having disposed of property of a succession without the authorization of the judge, is founded upon the reason of the articles preceding, assuming that the heir has failed to cause an inventory to be taken; that he has not renounced the succession; that he has assumed the quality of heir in an unqualified manner; that he has done some act which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir. C. C. 988.

It is necessary that the intention should be united to the

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fact, or rather manifested by the fact, in order that the acceptance be inferred. C. C. 990.

Various acts may indicate that intention, and there may sometimes be an actual intermeddling with the property of a succession, and yet the person not be liable as heir. On the other hand, there are some acts which are foreign to a succession and yet manifest a will to accept. C. C. 989; 19 La. 506; 15 La. An. 170.

Without now considering other provisions of law creating exceptions under these articles and affecting acts which may be differently interpreted, according to time and circumstances, it will be observed that the Code passes from the consideration of these general principles to rules of action against the heir, and the articles which we have quoted above must be considered in connection with the article 1422 *et seq.*

The personal action which the creditors of a succession can exercise against the heirs, has for its basis the obligation which the heirs are under to discharge the debts of the deceased.

This action is modified according as the deceased has left one or several heirs. Art. 1422 C. C.

But though the heirs and other universal successors who have not made an inventory as before prescribed, are bound for the payment of all the debts of the succession to which they are called, even when the debts exceed the value of the property left them, they are not bound *in solido*, and one for the other, for the payment of the debts. C. C. 1425.

When deceased has left one sole heir, this heir is bound for the payment of the whole debt and may be sued directly and personally as such. C. C. 1426.

If, on the contrary, the deceased has left two or more heirs, they are bound to contribute to the payment of those debts only in proportion to the part which each has in the succession. Thus the creditors of the succession must divide among the heirs the personal action which they have against them

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and cannot sue one for the portion of the other, or one for the whole debt. C. C. 1427.

In the same manner article 120 C. P. provides that where one against whom there was a cause of action die, leaving two or more heirs, the party may proceed against each of them for the share which he inherits if that share be sufficiently known or ascertained; otherwise, they can only be sued each for a virile portion, that is to say, for an equal part of the debt, dividing it into as many parts as there are heirs.

Article 40 C. P. declares that the heirs shall only be responsible for the amount and portion which each has inherited from the debtor's estate.

In 6th La. p. 17, it appears that Theodore Mudd sued the heirs of Madame Stillé, who were condemned jointly and severally for the debt of their ancestor. Say the court: "We have most positive legislative provision in our Code that heirs are liable only for the part which they have in the succession, and this is the case even where they have made no inventory." And the same decision was made in 2 La. An. 806.

It is manifest, therefore, that the judgment condemning defendant for the entire debt is erroneous. The authorities cited by plaintiff show, as far as we can perceive, that there was but the surviving heir who was sued, particularly the case of *Stephenson v. Wilson*, 7 La. An. 554.

Our understanding of the facts in this case, already intimated, shows that Mrs. Cavanaugh left nothing of value; that she was buried by the defendant at his own expense; and we now add that there is no evidence to show that he ever disposed of the effects taken to his house, nor does it appear that the plaintiff was in any manner injured. Laws must be interpreted and applied reasonably, and we should view the actions of our fellow-men just as reasonably. That it was physically impossible to remove such goods as plaintiff says was in the store, in the manner testified to by her witnesses, there can be no doubt; while it is quite certain that the testimony of the coroner, the police, the constable and the undertaker as to

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what was in the premises is conclusive. Under such a condition of facts, are we to consider that the defendant was seeking his own pecuniary advantage, in fraud of worthy creditors, by appropriating to his own use trash, not worth enough to pay the expenses of the funeral?

An act of piety or humanity towards one's relations is not considered an acceptance; it is not, therefore, an acceptance to take care of the burial of the deceased or to pay the funeral expenses, even without protestation. C. C. 1001.

That the law has justly provided for the payment of obligations due by a decedent out of his estate, and that no one shall, without legal authority, take, enjoy and dispose of this estate to his own use without incurring the obligation to pay the debt, is undoubted, and courts will not hesitate to strictly apply the law when the facts warrant. In this case, it has been made our duty to review the law having application to the personal liability of the heir. There has then been enacted article 1100 C. C., as applying to strangers taking charge of vacant estates, and article 2418, making the widow in community liable for concealing or making away with community property. The same principle of law governs in each of these cases, for the same great purpose of honesty and fair dealing is to be vindicated. This vindication could not happen if we harshly condemned and made a victim of one who, far from enriching himself, has expended his own funds in a pious, though for him as a relation, a very proper act.

In *Soubiran v. Rivollet*, 4th La. An. 329, the Supreme Court said: "The allegations that the defendant has concealed or made away with the effects of the succession are entirely unsupported by evidence. It is proved, on the other hand, that Rivollet lived separate from his wife, and was at the time of his death in a state of absolute destitution. His brother had to pay his funeral expenses, and the person in whose house he lived has a claim against him for rent and attendance, which she considers lost. This testimony makes it highly probable that the two trunks of which defendant

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Lacey vs. Ferguson.

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took charge, contained nothing but the papers and old clothes, which she offers to return. If, as we believe, the succession would not have defrayed the expenses of administration, the defendant was not bound to have it administered."

There is a strong analogy between the case at bar and the one just cited, and the judgment there rendered should be the one rendered in this.

It is, therefore, ordered that the judgment appealed from be reversed and set aside, and that there be now judgment in favor of defendant, rejecting plaintiff's demand, with costs in both courts.

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MCGLOIN, J., *concurring*.—In this case the evidence does not satisfy me that the removal of the effects of the deceased was the act of the defendant. He, himself, positively declares, under oath, that it was not, and that he knew nothing of it until upon returning from the funeral he found them upon his premises, and the circumstances connected with the removal corroborate him. The property occupied by Mrs. Cavanaugh was rented, and the landlord certainly was the only one interested to order the removal of the things in question before the funeral was ended, whereby his premises would be cleared of them. The burden was upon plaintiff to make certain her case upon this point as upon all others, and I do not think she has succeeded. Furthermore, although disposed to enforce fully the laws under consideration, I am not prepared to announce the doctrine that defendant who knew, as did all others who were acquainted with deceased, that she was utterly insolvent and that these things were all she possessed, rendered himself liable, as unconditional heir, for all her debts by simply removing from the premises of another, which they encumbered and depositing in his stable to be surrendered to whomsoever should call for the same with due authority, things which many reputable witnesses declare to have been mere trash, possessing no value whatever, or one so trifling as to be practically none. I consider the case very similar to the one reported in 4 La. An. 328, *Soubiran v. Rivollet*.

Rehearing refused.

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Harrison vs. Godbold.

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No. 116.

WILLIAM C. HARRISON *v.* FLAVIUS C. GODBOLD.

1. In determining the question of *res judicata*, it is the decretal part of a judgment which must govern.
2. In determining upon such a plea, the reasoning of the court can be resorted to only when the decretal portion is ambiguous.
3. Where plaintiff and defendant present claims and counter claims, and there is judgment in favor of either, for a specific sum and without reservation, the judgment is not ambiguous, but concludes the whole controversy.
4. Where a defendant presents a counter claim, either in the way of reconvention or compensation, which is not properly pleadable as such, and the court *a quo*, despite plaintiff's objection, permitted a full examination of such counter claim, this Court, although disapproving of the ruling of the judge *a quo*, may examine the merits of the defendant's demand, and determine against it, if not supported by the law and evidence.
5. Where a party by vicious pleadings drags another into court, and despite the protests of the latter, compels him to disclose fully his defense, and it is a good one, this Court will pass over the objections made by him, and in his interest will put the controversy at rest.
6. Where a judgment is susceptible of two interpretations, that one will be adopted which renders it more reasonable, effective and conclusive.

*Appeal from Civil District Court, Division E. Lazarus, Judge.**G. L. Hall* for plaintiff and appellant.*T. M. Gill* for defendant.

ROGERS, J.—The issues presented in this case were before us in the cause of F. C. Godbold vs. W. C. Harrison, which we decided in favor of the plaintiff. The questions now presented in the form of a direct action by Harrison were in the first case urged by way of a demand in reconvention. We were of opinion, after an examination of the pleadings and evidence, the proceeding by demand in reconvention should not be sustained; but the defendant, now plaintiff, was permitted to support his reconventional demand by evidence in the lower court. He was fully heard, and the testimony was before us,

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Harrison vs. Godbold.

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and we were in a position to understand the merits of his cause, and with propriety could have so modified our decree as to grant him the right to another form of action; and while required to determine the direct questions of pleading and practice set up in the bills of exceptions, we were not compelled to restrict our rulings to these questions alone. All matters were before us, and it was our duty as well as our right, to make our judgment definitive and final. This, in our opinion, was done; and thus plaintiff so understood it, as he sought in an application for a rehearing to obtain such a modification in our decree as would settle his right to his present suit; this we declined.

We held that Godbold had been in the employ of Harrison for years. His salary had been repeatedly increased, and with every change, board had been included, although not specially mentioned. When it came to make the last agreement, Godbold had the right to suppose that his board would be still included, as before, and if Harrison contemplated any change in this respect, it was his duty to have so declared. 1 McGloin, 35.

We are now called upon to hear and determine this question again. Why we should do so is not shown by any change of averment, nor argument that there is a reason for a change in our opinion, or that the rights of the party have not been fully passed upon. If our judgment is susceptible of two interpretations, we have the right to give to it that which, in our opinion, renders it the more reasonable, effective and conclusive. 6 La. An. 181.

The plea of *res adjudicata* was properly sustained by the judge *a quo* and his judgment is affirmed.

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#### ON APPLICATION FOR REHEARING.

MCGLOIN, J.—It is now well settled that in determining the question of *res adjudicata*, it is the decretal part of a judgment which must govern; that the only purpose which the

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reasoning of the court may serve, is to interpret the latter, where it is ambiguous. *Chaffe Bros. v. Morgan*, 30 La. An. 1310; *Davidson v. Carroll*, 23 La. An. 108; *Succession McDonogh*, 24 La. An. 34; *Davis v. Millaudon*, 17 La. An. 97; *Fisk v. Parker*, 14 La. An. 496; *West Feliciana R. R. Co. v. Thornton*, 12 La. An. 736; *Keane v. Fisher*, 10 La. An. 261; *Pepper v. Dunlap*, 5 La. An. 200; *Thompson v. Mylne*, 4 La. An. 211; *Plique & LeBeau v. Perret*, 19 La. 324; *Hill & McGunnigle v. Bowman*, 14 La. An. 446; *Marcadé*, vol. 5, p. 386.

In the original litigation, plaintiff and defendant presented to the court claims and counter claims, upon which evidence was received, and this tribunal, in its decree, without any reservations whatsoever in favor of defendant, gave judgment for a specific sum for the plaintiff. Under the authorities, such a judgment is not ambiguous, but constitutes a complete disposal of all the issues. *Theriot v. Henderson*, 6 La. An. 222; *Erwin v. Bissel*, 17 La. 96; *Powell v. Graves*, 14 La. An. 874; *Plique & LeBeau v. Perret*, 19 La. 324; *Kelly v. Caldwell*, 4 La. An. 40. See, also, *Succession McDonogh*, 24 La. An. 34.

In the case of *Godbold v. Harrison*, defendant in that case, plaintiff in this, applied for a rehearing, on the ground that our decree was final as to the cross claims presented by him; whereas, we had in fact determined the case only upon questions of pleading. We agreed with him in the first part of his proposition, but declined reopening the case. Notwithstanding the insufficiency of his pleadings, he had been enabled by the view taken by the judge *a quo*, to make a full showing upon his claims. He had compelled the plaintiff to combat them despite his protests. The whole case was, therefore, fully before us. We had examined the evidence carefully, heard counsel, and had the benefit of briefs, and were in every way in a proper condition to render justice.

We considered it proper under the circumstances, although our written opinion directed itself more particularly to the questions of pleadings, to allow the decree to remain a definitive one.



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*Louisiana Ice Company vs. State National Bank.*

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Litigants cannot drag their opponents into court upon vicious pleadings, and after the merits of the controversy have been fully disclosed, despite the protests of the latter, seek, when victory rests with the adversary, thus forced wrongfully into the controversy, to take advantage of their own errors to impose upon the latter the annoyance and expense of a second suit involving the same issues.

In such a case, where the circumstances permit it to be done with justice, the Court, in the interest of the party aggrieved, while reprobating the errors of pleading or practice, may, and in fact should, put the controversy at rest forever. See *Copley v. Robertson*, 6 La. An. 181, 182.

Rehearing refused.

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No. 69.

LOUISIANA ICE COMPANY *v.* STATE NATIONAL BANK OF  
NEW ORLEANS.

1. The certification of a check by the bank on which it is drawn, is equivalent to an acceptance. Such a check stands upon the same footing as an accepted bill of exchange.
2. There is a privity between a bank certifying a check, negotiable in form, and every holder thereof up to the time of its extinguishment. The bank may be sued by any such holder.
3. When a bank receives on deposit checks, promissory notes or similar paper, the contract is usually one of deposit for collection only. Title is not divested from the depositor and vested in the bank.
4. Even where the bank permits its depositor to draw against such checks, the credit is only conditional, and the absolute title of the latter is not thereby divested.
5. In such a case, where the depositor has not drawn against such deposited paper, he can, at any time before collection, revoke the agency of the bank and reclaim the deposit.
6. Where the principal applies to a court of justice to enjoin his agent from further acting under the power, this is a revocation of the agency.
7. Any person who is aware of the issuance of such an injunction, or of an application therefor, is charged with notice of the revocation.

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Louisiana Ice Company vs. State National Bank.

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8. Parties in their pleadings are not required to describe a thing so minutely as to furnish a detailed statement of every one of its peculiarities. It is sufficient, if by the aid of what it recited, the thing may be easily and certainly identified.
9. Persons cannot, by wilfully closing their eyes to marks of identification in themselves sufficient, decline notice, because other particulars are not furnished which might have been more satisfactory to them.
10. The depositors of banks which have formed themselves into a clearing house, are not bound by the rules and regulations or usages of the latter.
11. They are entitled to expect certain results, and the means which the banks adopt to secure the same are a portion of the internal administration of such institutions, in which the depositors have no voice or concern.
12. U. S. Rev. Stats. Sec. 5228, does not apply to a case like this. It does not make property belonging to others, found in the custody of a national bank at the time of its suspension, under contracts other than special deposit, liable for the debts of the bank.

*Appeal from Fifth District Court. Cullom, Judge.*

*E. E. Moise* for plaintiff.

*Jas. McConnell* for defendant, appellant.

MCGLOIN, J.—Plaintiff was a depositor in the New Orleans National Bank, and as such, upon October 4th, 1873, deposited after banking hours in said bank, two checks, one upon the defendant bank for \$1000, and the other upon the Teutonia Bank of this city. The former was certified by defendant, and was drawn by the New Orleans Mutual Insurance Company to the order of Sam Averrons, and by him endorsed in blank. When deposited, it was endorsed for deposit by D. Pochelu, as Vice-President for the plaintiff company. Upon that day the New Orleans National Bank suspended. It had been a member of the New Orleans Clearing House, the various banks composing which had been in the habit of exchanging checks every morning at the counting house of the institution, as is customary with clearing houses.

Pochelu, the Vice-President of the Ice Company, hearing of the suspension, repaired early next morning to the New Or-

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Louisiana Ice Company vs. State National Bank.

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leans Banking Company, which still held the check in question, and, finding that it had not yet passed through the Clearing House, demanded its return, and informed the cashier of the institution that he was about to issue an injunction restraining the exchange.

The said vice-president did repair to the late Superior District Court, and obtained a writ of injunction directed against the Clearing House and against the New Orleans National Bank, restraining them from passing said check. The description of this instrument in the writ is as follows :

“ A check for the sum of one thousand dollars, drawn on the State National Bank, and endorsed for deposit by D. Pochelu, vice-president of the Louisiana Ice Manufacturing Company, said check now in the possession of the New Orleans Banking Association.”

This writ was duly served upon the Clearing House before the usual hour of exchange, and as it was being so served, the cashier of the defendant bank was present, inspected and read the writ. He, sworn as a witness, claims that he “ did not know what check it was. It was not described.”

The New Orleans Banking Company, in consequence of its suspension, did not appear upon that day, as usual, at the Clearing House, and the manager of that institution advised the other banks to make their exchanges direct with the suspended bank. This the cashier of the defendant bank did, after Pochelu had demanded the check of the New Orleans National Bank, and after he, said cashier, had inspected the plaintiff's writ of injunction. The State National Bank thus received the check in question, with others drawn upon itself, surrendering for them various checks upon the New Orleans National Bank, which, by the failure of the latter institution, were then either worthless or very much depreciated. Plaintiff sues for damages, alleging the loss of said check, or its proceeds, by reason of said actions of defendant.

The demand is sought to be met, by the following defenses :

1st. That there was no privity between plaintiff and de-

fendant, and hence, no cause of action lies in favor of the former against the latter. *McWilliams v. Hagan*, 4 Rob. 375; *McCulloch v. Commercial Bank*, 16 La. 566; and *Oakey v. Bank of Louisiana*, 17 L. 386, are cited.

2d. That by the deposit of this check and the placing of its amount upon the pass-book to the credit of plaintiff, the check became the property of the New Orleans National Bank, and plaintiff lost the right to control or recall it.

3d. That in making said deposit the rules and usages of the Clearing House became applicable, and that the obligation of the bank was not to collect in cash, but by exchange of checks with the drawer, as customary.

4th. That not having made the defendant party to its injunction, the plaintiff cannot thereby affect it in any manner.

5th. That under the terms of the National Banking Act, after the failure of the New Orleans National Bank, the assets of the bank had to remain in *statu quo*, and were the common pledge of all the creditors, the law allowing only special deposits to be withdrawn. 100 U. S. 699, 703; U. S. Rev. Stats. Sec. 5228; *Morse on Banking*, § § 516, 517, 518; *Venango National Bank v. Taylor*, 56 Penn. St. 14.

#### I.

The check in this case was certified by the defendant bank. It is now well settled that certification is equivalent to acceptance, and that a check certified stands upon the same footing as an accepted bill of exchange. *Merchants' Bank v. State Bank*, 10 Wallace, 604; *Beekford v. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Brown v. Leckie*, 43 Ill. 497; *Barnett vs. Smith*, 30 N. H. (10 Fost.) 256; *Farmers' and M. Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125.

A party who accepts negotiable paper endorsed in blank, binds himself unconditionally to pay whatever person may be its holder at maturity. There is a privity between such acceptor and all owners of such paper previous to the time of its extinguishment. Therefore, by reason of the certification,

the State National Bank assumed the obligation of paying this check to the plaintiff as a *bona fide* holder thereof, and a privity did exist. Morse on Banking, Ed. 1879, pp. 310, 313, 322. None of the authorities cited by defendant, in any manner, controvert this proposition.

## II.

The check in this case was deposited as usual, the amount thereof being entered upon the pass-book of plaintiff. Whether it was entered upon the books of the bank does not appear.

If, by reason of this entry alone, and without anything being drawn by plaintiff against the same, this check became the property of the bank, and the Louisiana Ice Company lost all title thereto, then, perhaps, there would be no cause of action. The evidence, however, does not show that such transfer of ownership was contemplated or affected either by stipulation or usage. On the contrary, Blache, the cashier of the New Orleans National Bank, and Dupuy, cashier of the State National Bank, both testify that the latter bank had no pecuniary interest in the checks the latter bank held and exchanged, its obligation being only to collect with due diligence for its depositors. Speaking of these checks, Dupuy says, that if they had not been paid they would have been handed back to the depositors, the bank not having a cent's worth of pecuniary interest in the matter.

Checks, like drafts, bills, or notes, so deposited with a bank, are placed for collection, and not sold, exchanged, or otherwise made the subject of a contract calculated to transfer title. It is hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility for such paper. The fact that, owing to the short course such paper has to run, these institutions usually permit their customers to draw against the amount of checks deposited, does not, of itself, alter the relations between the parties. The credit is only conditional, and may be cancelled, and the check returned, should the latter be dishonored. The depositor remains owner of the paper, and the bank merely the agent.

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Morse on Banks and Banking, Ed. 1879, pp. 427, 428; *Scott v. Ocean Bank*, 23 N. Y. 289; *Giles v. Perkins*, 9 East. 12; *National Gold Bank v. McDonald*, 51 Cal. 64.

It follows, that if plaintiff remained the owner of this check, and the New Orleans National Bank merely the collecting agent, that the former had the right to control the paper, at least so long as the bank had acquired no rights thereupon by reason of plaintiffs having drawn against the provisional credit. It had the right, at any time, to revoke the mandate and reclaim its property. This the Louisiana Ice Company did previous to the exchange of checks complained of. The refusal of the New Orleans National Bank to return this check upon demand of its owner, and its subsequent surrender thereof, despite the contrary instructions of the plaintiff to the debtor bank, for its own worthless paper, was a flagrant violation of the principles of justice, in which the defendant bank was a participator.

The question, whether the State National Bank, in a case such as this, was bound by such revocation, without notice, does not arise. There can be no more emphatic revocation of agency than where the principal invokes the interference of a court of justice to prevent his mandatory from continuing in the performance of the duties which had devolved upon him under the procuration. The fact that such an injunction had issued, came to the knowledge of the defendant through its cashier, the very officer who subsequently, for the corporation he represented, effected the exchange.

The excuse that he was unable to identify the check is untenable. The writ of injunction in this instance does not, it is true, set out the check at large, but it does furnish indications, whereby it might have been easily identified. It gave the amount, the name of the bank that held it, and of that upon which it was drawn, and a description of the most prominent endorsement upon it. Parties in their pleadings are not held to descriptions so very minute, as to furnish a full recitation of every separate and particular characteristic of the property

they demand. It is sufficient if, by the aid of what they do recite, the property may be easily and certainly identified. It so happens, that in this case, amongst the list of checks taken by defendant, by virtue of this exchange, this particular check was the only one for said amount of one thousand dollars. Nor was there any besides it with the endorsement thereon described in the writ. It was the duty of the cashier of the defendant bank to have examined these checks, when he took them, in order to ascertain if any one of them was covered by the description in the writ, for he was charged with notice that, as to that particular check, the agency of the New Orleans National Bank was at an end. He could not, by willfully or carelessly closing his eyes to marks of identification, in themselves amply sufficient, ignore the revocation, simply because other particulars were not furnished which, in his opinion, would have been more satisfactory or precise.

### III.

We cannot accede to this proposition of defendant. Clearing Houses are associations formed between banks, in order to expedite and facilitate the transaction of business between themselves. The same reasons which impel banking companies to engage the services of cashiers, tellers, book-keepers and other subordinate officials, impels them to join together in the creation of clearing houses. Those who deal with banks are entitled to the execution of their contracts, or the performance of such services as they are entitled to either by stipulation or valid usage. With the machinery the banks may choose to employ, for the purpose of fulfilling their obligations, customers have nothing whatever to do. So that that for which they have contracted is duly performed, whether it be accomplished by one means or another, is no concern of theirs. The rules and methods observed by such institutions are adopted for their own individual safety or convenience, and they are alone entitled to the advantages accruing, and alone assume the risks and responsibility arising therefrom. To hold differently, would be to charge outsiders with every

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custom adopted by banks in the internal management of their affairs; and it might give to such persons the right to complain of their abrogation or modification, and so the public might exercise a certain control which, to say the least, would be, to such institutions, most inconvenient. Grant on Banks and Banking, (Ed. 1879), p. 452; *Overman v. Hoboken City Bank*, 1 Vroom, 61; 2 Vroom, 563.

In this case, the obligation of the New Orleans National Bank was to collect this check in cash. If this purpose could be practically accomplished through the Clearing House, or by the runner, or by exchange, then the depositor, not being injured, could not complain. But, if by the intervention of the usages or rules of the Clearing House a result was accomplished entirely different, and the check was not paid in cash, or what was its equivalent, the depositor is not bound, because it is with results alone, and not with the means, that he is chargeable or concerned.

But, even were we to hold the plaintiff bound by the rules and usages of the Clearing House, it would be secure, for its writ was directed against that institution and served in time to prevent the exchange, had it been attempted, according to the customary method. So, on the other hand, plaintiff, if himself bound, had the right to hold defendant as well strictly to these rules, and to complain of an exchange which was not made through the Clearing House at all, but contrary to its rules and usages between the banks direct. It would have the right to say, this check was deposited to pass through the Clearing House, and that was a tacit understanding, forming part of the contract, and in ample time, the exchange, in that way, was enjoined, and the rights acquired by such injunction could not be defeated by an exchange whose accomplishment was owing entirely to the abandonment and repudiation of these very rules and usages.

#### IV.

Whether the State National Bank was bound to respect a writ of injunction which it knew to be in existence, even



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Baldwin vs. Handy.

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though not directed individually against it, but against an association which was its agent, for the very purposes affected by the writ, is not necessarily a question in this case. We hold, that the agency of the New Orleans National Bank to collect this check was revoked by this writ and before the exchange, and that the defendant is chargeable with notice thereof. This is sufficient, and we, therefore, abstain from the determination of this particular proposition.

## V.

The statutes and authorities cited by defendant relate exclusively to the *assets* of National Banks which fail or suspend. Holding that this check was the property of plaintiff, it results that it was not an asset of the New Orleans National Bank, and so, was not to be disposed of for the benefit of its creditors. The law and authorities cited do not declare that what is indisputably the property of another, although the bank may not hold it by virtue of a contract of special deposit, but by virtue of a loan, hiring, or as agent, must pass to the creditors of the bank. If the law were such it would be unconstitutional, null and void, as authorizing what would be an absolute spoliation.

The court *a qua* found for plaintiff, and the judgment is affirmed.

Rehearing refused.

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No. 1.

*Court of Appeals, Fifth Circuit, Parish of St. Mary.*

ALBERT BALDWIN *v.* JAMES H. HANDY.

An unliquidated demand cannot be plead in compensation against one which is liquidated.

DUMARET, J.—This case is appealed from the Parish Court, and comes before this Court by operation of law.

It is based on a promissory note for the sum of \$231 05,

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State ex rel. Paris vs. The Recorder of Mortgages.

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duly signed by defendant, and transferred by endorsement to plaintiff.

The only plea set up by defendant and appellant is one which *might be termed a plea in compensation*. That plea is based on an unliquidated claim, the correctness of which has not been conceded, as against a duly recognized, admitted and proven liquidated claim in hands of plaintiff.\*

We see no reasons to disturb the judgment of the lower court.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed at appellant's costs in both courts.

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No. 104.

STATE OF LOUISIANA *ex rel.* MRS. FRANCES M. PARIS *v.* THE RECORDER OF MORTGAGES AND CITY OF NEW ORLEANS.

1. Privileges for taxes are prescribed by three years; but when such privileges are recognized and perpetuated by the judgment of a competent court, this prescription does not apply.
2. "If the price offered by the highest and last bidder is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication." C. P. 684.

*Appeal from the Sixth District Court. Rightor, Judge.*

*B. R. Forman* for plaintiff.

*S. P. Blanc* for defendant and appellant.

ROGERS, J.—At the time of the sale and purchase of the real estate by plaintiff there were recorded in the office of the Recorder of Mortgages of this city judgments, with special lien and privilege on the property, in favor of the City of New Orleans amounting to \$555  $\frac{28}{100}$ .

The price of adjudication was \$250.

Art. 684 C. P. declares, that "if the price offered by the

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\* See Godbold vs. Harrison, page 34.

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Grivot vs. Waples.

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highest and last bidder is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference on the judgment creditor, there shall be no adjudication," etc.

Judgment for taxes, recognizing the lien and privilege granted by law, and duly recorded, are of the highest rank; it is only the privileges for taxes which is prescribed by three years. This provision of law does not apply when the amount has been liquidated, and the privilege recognized and perpetuated by a judgment of court, and duly recorded.

The authorities cited by plaintiff refer to the privileges simply, not judgments.

Courts cannot inquire into the policy of laws when provisions clear and mandatory unmistakably declare the duty to be performed.

The judgment is reversed, and it is ordered that the sale of the real estate to Mrs. Frances M. Paris by the Constable of the First Justice's Court, parish of Orleans, on August 17, 1878, in the suit of Home Ins. Co., Mrs. Frances M. Paris, subrogated, *v.* Hugh J. Campbell, No. 3338 of its docket, be set aside as null and of no effect, plaintiff paying costs of both courts.

Rehearing refused.

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No. 38.

LAURA GRIVOT *v.* RUFUS WAPLES.

1. Where appellant brings up a transcript which is clearly defective, and no attempt is made to cure its defects, the case being submitted to the court, the appeal will be dismissed *ex propria motu*.
2. Referring to a transcript previously prepared, upon another and distinct appeal, does not make that record a part of the latter transcript.

*Appeal from the Sixth District Court. Rightor, Judge.*

A. J. Ker for plaintiff.

Defendant in person.

MCGLOIN, J.—The transcript in this case consists only of

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the judgment appealed from, and writs and proceedings subsequent thereto. The clerk certifies that the record contains all proceedings had and documents filed since the date of his certificate, to a previous transcript prepared in the cause upon a former appeal. That transcript has not been filed in this Court, nor have we any evidence in the record that it was ever filed in the Supreme Court.

We can certainly not determine a cause where neither the pleadings nor the evidence are submitted to us. The case has been pending on appeal three years without any attempt upon the part of either appellant or appellee to supply deficiencies; if, indeed, appellant, having so palpably failed in his duty, under C. P. Arts. 585, 587, 588, would have been permitted to repair his omission. Under the circumstances, although appellee has not moved us so to do, we feel compelled to dismiss this appeal, *ex propria motu*, at appellant's costs.

In so doing, we are guided by the following authorities: Baungard *v.* Mayer, 9 La. 119; Gilloulet *v.* Marcelin, 7 La. An. 442; Harris *v.* Hayes, 8 La. An. 433; Succession of Chew, 18 La. An. 229; Ruleff *v.* Nugent, 21 La. An. 299; Charbonnet *v.* Dupasseur, 27 La. An. 105; Spofford, judge, dissenting, in State *v.* Wilson, 13 La. An. 288. Of the foregoing cases, in 27 La. An. 105; 18 La. An. 229; 8 La. An. 433; 7 La. An. 442, the Court acted, as we are doing, *ex propria motu*.

In Ruleff *v.* Nugent, 21 La. An. 299, the certificate, as in this case, referred to a transcript then on file in the Supreme Court, and this was held not to make that preceding transcript a portion of the new record.

In the late case of Vredenberg *v.* Behan, 32 La. An. 561, the clerk in his certificate referred to two preceding transcripts, as in this, and the Supreme Court refused to dismiss. But the Court in that case does not impeach the authorities upon which our opinion is based, declaring that they did not apply to the case under consideration, which, it is stated, was "*sui generis*." The special features of that case, rendering it peculiar, were that all of these separate transcripts were filed under the

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Hays vs. Smith Bros. & Co.

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same number in the Supreme Court, which was that of the first appeal, No. 7858, without objection, making them all practically parts of but one record.

The cases of *City v. Lacroix*, and *City v. Cordeville*, 18 La. An. 146, declare, it is true, that the Court in a contingency, such as this, will remand. But those cases are not well considered, referring to 9 La. 119, which is exactly to the contrary; and they also clash with the views, by the same bench, expressed in 18 La. An. 229. They are also in conflict with the current of decisions upon this question, which may also be said of the authority, *State v. Wilson*, 13 La. An. 288, where the Court, Judge Spofford dissenting, considered the record as though complete, and passed judgment upon the case.

Let the appeal herein be dismissed, at the cost of appellant.

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No. 125.

## ISAAC HAYS v. SMITH BROS. &amp; CO.

1. Where defendants purchased two hundred casks of Seltzer waters, packed in Prussia, in casks of one hundred stone jugs each, and it is shown that such casks cannot be transported without some breakage of the jugs; held, that these circumstances have entered into the contract, and where the actual breakage is not beyond what is usual, the vendee cannot refuse to receive the property and rescind the contract.
2. Where, in such a case, before attempting to avoid the contract, defendants had received ninety casks, and subsequently tendered to plaintiff the price thereof, which he received, such plaintiff does not thereby necessarily waive his right to recover for the price of the remainder.
3. Where defendants were in default by refusing to accept the property, plaintiffs were not compelled to sell at defendants' risk immediately. Mere delay and indulgence in such a case, incurred in attempts by plaintiff to secure a settlement, cannot avail defendants as a means to avoid liability.
4. Defendants having positively refused to accept the remainder of the consignment, no putting at default was necessary.
5. The sale at a purchaser's risk in cases such as this, is not a sale *a la folle enchere*, as provided in the Civil Code.
6. Where evidence showed a setting apart and sale of the 110 casks, at the

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risk of defendants, the mere fact that the auctioneer's statement or bill showed a purchase by the adjudicatee of 113 casks, will not warrant the court in ignoring the other evidence upon this question.

7. Where a purchaser refuses to comply with his contract, the vendee may store the property at his risk in a public warehouse, retaining, however, the possession and control of the property to enforce and secure payment of the price.
8. Unless the storing be made *in the name of the purchaser*, it is not a consignment, divesting the seller of his right of detention until payment of the price.

*Appeal from Civil District Court, Division A. Tissot, Judge.*

*Breaux & Hall* for plaintiff and appellant.

*Gilmore & Sons* for defendants.

ROGERS, J.—The defendants contracted with one B. E. Castendyk, who was the duly accredited agent of plaintiff, for two hundred whole casks of Seltzer water of one hundred jugs each, to be shipped direct from Rotterdam to New Orleans.

The water was shipped on the vessel "Jos. Slater," and reached this port early in May—about one month after the contract. The defendants received and hauled to their store ninety casks of the consignment, and refused to receive any more. After considerable correspondence between the parties, and some delay, the balance of the order, say 110 casks, on December 17th, were sold, and this suit is to recover from defendants the difference between the contract price and the sum realized by the sale, with certain expenses, such as storage and the like.

Defendants answer that the two hundred casks were in unmerchantable condition; that inasmuch as plaintiff accepted payment for the ninety casks taken, he cannot claim more, and virtually discharged defendants from the contract; that plaintiff took charge of the remaining 110 casks, and held them until the season for the sale and use of the article had passed.

Our learned brother, who seems to have given the case great consideration, did not think there was much merit in the

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defense, in so far as the facts disclosed the unmerchantable character of the goods, or that because plaintiff accepted the payment for ninety casks actually delivered, declaring, when he so accepted, that he would hold defendants for the balance, he thereby discharged them from the contract. In these conclusions we agree with the District Judge. The Seltzer water is a staple article, shipped in a certain manner, viz: in jugs packed in casks. Nothing unusual or extraordinary is shown in the condition of this shipment, which should take it out of the general rule, that must inevitably apply to such cargoes. When defendants ordered them, they must be presumed to have known the manner of packing such articles.

Plaintiff was justified in receiving payment for his property, which defendants had received. It was due to him, and he did not necessarily abandon his right to recover the whole contract. We cannot presume a man intends to give away a right. In this case, however, on the acceptance of the money, plaintiff notified defendants he accepted the payment as made, on account of the whole order. But the judge *a quo* considered that the sale at public auction in December, and the failure to make a tender, and set apart the 110 casks after the refusal of defendants, should avail the defense. In this we do not agree. If defendants had so desired, they could at any time have taken possession of the 110 casks before the sale, and the mere indulgence granted them, in attempts to obtain a settlement, cannot, and should not, be permitted to them as a means of avoiding liability. 10 Bos. (N. Y.) 130. There was no necessity for a formal tender; the defendants had absolutely refused to receive the shipment; the law does not compel a person to do a vain thing. 3 La. 385; 14 La. An. 401. 1 McGloin, 151.

When defendants refused to accept the goods, plaintiff had the right to sell the rejected goods to the best advantage. He was not bound to sell at auction. Defendants were notified that the 110 casks were stored at their risk, and when the sale was announced they were fully notified.

The proceeding had in this case has evidently been confused

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with the technical proceedings of a sale *à la folle enchère*. There can be no such sale, unless preceded by a sale at auction. Under the provisions of our Code, the remedy must be strictly construed, the original vendee is absolutely bound by the price of the sale *à la folle enchère*, and cannot dispute it. 14 La. 585. In the sale resulting as in the present, from a breach of contract, the difference of the price is a *prima facie* estimate of damage—it is not absolute. 3 La. 384; 4 La. An. 641.

At the sale in December Schmidt & Zeigler purchased. It is contended they were plaintiff's agents, and, purchasing as they did, forfeits plaintiff's right to recover. The testimony does not show that Schmidt & Zeigler were the agents of plaintiff. They were the consignees of the ship "Jos. Slater," and beyond this, as to this cargo, bore no other relation.

We think plaintiff should recover. The judgment is reversed, and it is now ordered, adjudged and decreed that plaintiff recover from the defendants, Charles Smith, Thomas Smith and J. B. Sinnott, and the firm whereof they are members, Smith Bros. & Co., *in solido*, the sum of \$694 30, with legal interest from July 12, 1879, with costs of both courts.

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#### ON APPLICATION FOR REHEARING.

MCGLOIN, J.—An earnest application has been made in this case for a rehearing. It is complained, that inasmuch as defendants bought two hundred casks of one hundred jugs each, they were entitled to a delivery of twenty thousand jugs, and could not be compelled to receive less. The principle contended for is correct, that a purchaser cannot be compelled to accept less than that for which he has contracted; but we do not consider it applicable to a case like this. Defendants did not purchase twenty thousand jugs of Seltzer water in so many separate packages, but they bought two hundred casks, each to contain one hundred jugs. The law, in cases such as this, is not intended to govern arbitrarily, but simply to regulate such transactions in default of contracts express or implied. It is



shown that Seltzer water is universally packed in the manner in which the water in this case was put up; that it is so packed in Prussia, and has to bear transportation from thence. The commodity is a cheap one, and cannot bear an expensive method of preparation for shipment. The style of packing is universally known. It is shown that it is an impossibility to transport these casks of stone jugs without some breakage. All of these facts must have been known to defendants, and they must be held to have contracted with reference thereto. If their position be well taken, it would be a matter of impossibility to make binding contracts of sale, so far as goods of this character are concerned, inasmuch as, if any of the jugs were broken during transportation, as must be in every instance, the vendee would be at liberty to repudiate the contract if he chose so to do.

Had the purchase in this case been of two hundred blocks of ice, of a ton each, the purchasers could hardly maintain that they were not aware of the fact that ice melts, and demand a rescission of the contract under the authorities they have cited, because, in transit, the ice had lost some of its original weight. Defendants have not asked a diminution of price, and so we were not called upon to determine who should bear the loss from breakage in such cases, but we do declare it to be our opinion that the circumstances disclosed do not warrant the demand for rescission.

It is complained that this Court did not notice the defense that the 110 casks in question were not set apart, but were sold confusedly with two other casks, making 113 in all. The notices to defendants, the advertisements and other evidence, shows that 110 casks were tendered and stored, and subsequently sold at defendant's risk. To destroy this defendant relies upon the bill or statement of the auctioneer, showing sale of 113 casks at a certain price *per cask* to Schmidt & Ziegler. It is not shown that there were not two offerings, one of 110 casks, and the other of two casks, which being to same purchaser, at same price, were put in one bill. A simple *statement* or docu-

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ment like this, which seems to have escaped special notice below, and which does not purport to furnish a detailed history of the transaction, with reference to which transaction the defendant has not chosen to give us the particulars, will not warrant us in disregarding the other evidence.

It is also urged that after plaintiff had stored the Seltzer water at the risk of defendants, the goods were, in fact, their property, and plaintiff had no right to sell, as he has done. It does not follow, upon every such storing, that there is a divestiture of the seller's right of possession until payment. After default the goods were at the risk of Smith, Brothers & Co., La. Civil Code, Arts. 2467, 2468, 2469, but plaintiff was under no necessity of allowing them to remain upon the public landing, or even to encumber his store, if he had had one. La. C. C., Art. 2469. He was at liberty to place them on storage in a safe and proper place, as for instance in a public warehouse, notifying the vendee of the fact, and that the goods are still at his risk. This was all that plaintiff did in this case. His agents still retained control of the property which stood in their name at the warehouse. Had the property been there stored, *in the name of Smith, Bros. & Co.*, and they notified accordingly, then there might have been, by plaintiff, a surrender of the right of possession, until payment, granted by La. Civil Code, Art. 2487. In such a case, perhaps the sale at auction might have been a re-taking by plaintiff of the goods; but in this case, there was nothing of the kind.

Rehearing refused.

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No. 113.

S. OTERI & BRO. v. HOME MUTUAL INSURANCE COMPANY.

1. Where, by the terms of an open or running policy of marine insurance, the insurance to be effected is limited to "goods and merchandise," "laden or to be laden" on shipboard, the same to be *approved* by the insurer, and to be *endorsed* on the policy, such policy will not cover anything not so laden on shipboard, nor will it attach to any property not fairly embraced within the description of "goods and merchandise."

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2. Such a running policy is at most a promise or contract to effect future insurance, only upon shipments made in accordance therewith, and upon compliance with all the terms and conditions thereof; and such policy gives no right to the holder to apply for insurance thereunder of things different from those contemplated by and described in the instrument.
3. An application for the endorsement on such a policy of insurance on "one new sloop in tow of" a vessel, creates no obligation on the part of the insurer to accept it; and when the endorsement is not, in fact, made as demanded, there is no contract of insurance under the policy.
4. A sloop in tow is not "goods and merchandise," as contemplated by such a policy.
5. Nor is it "laden on shipboard," as the term is used in such a policy.

*Appeal from Fifth District Court. Rogers, Judge.*

*Hornor & Benedict and F. W. Baker for plaintiffs, appellants.  
Singleton & Brown for defendants.*

The opinion and decree in this case were delivered by E. M. Hudson, Esq., Judge *ad hoc*, sitting in the place of Rogers, judge, recused.

HUDSON, Judge *ad hoc*.—This is an action by S. Oteri & Brother against the Home Mutual Insurance Company for \$1000, based upon a running or open policy of insurance. The policy is dated September 19th, 1870; it was intended to embrace "all kinds of lawful goods and merchandise, laden or to be laden" on shipboard, at invoice cost and ten per cent, as interest might appear, for account of whom it might concern, beginning the adventure from and immediately after the loading thereof on board of the vessel; but it expressly provides that the policy is made "to cover all shipments made in accordance therewith," and the insurance is declared to be "on all shipments which may be hereafter endorsed on this policy. No risk binding unless endorsed on this book or approved by assurers."

On the 26th January, 1876, the plaintiffs made application to the company for an endorsement of insurance to the amount of \$1000 on this policy, of "one new sloop in tow of schooner J. Wood at and from New Orleans to Bay Islands," employing for this purpose the usual blank form proper for making application for endorsement of insurance on this policy. In

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the absence of the marine clerk, the secretary of the company received the application, together with the open policy and book to which it was attached. He fixed the rate of premium at  $3\frac{1}{2}$  per cent, making \$35, and inserted the same on the application, and after having endorsed on the book, "insurance on merchandise to the value of \$1000 on the schooner J. Wood, from New Orleans to Bay Islands," with the specified premium, immediately returned the policy. Plaintiffs' clerk, who made out the application, and brought it with the policy to defendants' office, received the policy with the endorsement as made on the book, and took it away without any examination of the same. The stipulated premium was subsequently paid. The sloop intended to be insured was lost on the voyage at sea while in tow of the schooner Jennie Wood, and payment of insurance therefor having been refused by the company, plaintiffs instituted this suit for recovery thereof. The answer contains a special denial that the sloop was insured, as well as certain other averments which, under the view we have taken of the case, it is not deemed necessary to state.

An examination of the policy leads us to conclude that, *of itself*, it insures nothing subsequent to its date; by its very terms it contemplates, under certain terms and conditions, the making of future insurance on shipments of lawful goods and merchandise, laden or to be laden on shipboard; it is not even an absolute contract to insure any shipments of the insured; it is, at most, a promise or contract to make insurance on shipments of certain things, goods and merchandise, *under the conditions expressed in the policy*; and, as to such future shipments, the policy was not to attach, the insurance was not to be effected, until those conditions and terms were complied with. This agreement to insure was intended to cover only goods and merchandise from the time of loading the same on shipboard until they were safely landed, for which a premium in accordance with the rules of the board of underwriters at the time of shipment was to be paid, and such insurance was, by the terms of the policy, limited not alone to *all shipments made*

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*in accordance therewith*, but to such of these *as were endorsed* on the policy, and no risk was to be binding unless so endorsed or approved by the assurers.

Under such a policy, if the risk, for which application is made to the insurers, comes within the description of the policy, and the conditions of the policy are complied with, the insurers will be held; for the object and intention of making such a policy is to hold the insurers to this extent. The parties themselves can make the endorsements or fill up the blanks of the policy *only* in such a manner as to be consistent with the policy. It certainly is not obligatory on the insurers to make an endorsement, unless it be required by the policy; for the insured cannot hold the insurers beyond the requirements which they themselves have made or stipulated.

The material question then to determine is, whether or not the company was under a contract, *within any of the terms or conditions of the policy*, to insure risks of the nature of that for which application was made by the plaintiffs; for unless the contract is contained in the policy, or a special contract is shown, none exists.

No special contract, outside of this open policy for insurance of the *sloop*, has been shown, nor is there anything in the record to prove that an officer of the company had the power to bind it beyond or contrary to the terms of this policy.

In vain we have scanned this policy with a view to discover any right of the plaintiffs to demand insurance *thereunder* of the risk in question. In no sense does the subject fall within the terms of the policy. The *sloop* cannot, in any ordinary and usual meaning of our language, be considered goods or merchandise within the scope of the policy, and if it could be, it was not laden on board the schooner Jennie Wood, nor was it endorsed on the policy or the book attached to it, as required by the policy. Indeed, the plaintiffs had no right to require the endorsement of this risk on this policy, and yet the application in express language requested that the endorsement of *this* risk be entered on *this policy*. No authority existed in

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the officer or clerk of the company, to whom the application was presented, to *change* the policy by endorsing thereon a risk not within the contemplation of the contract as made by the plaintiffs and defendants. There was, in fact, no endorsement on the policy of the risk as presented by the plaintiffs; but an entirely different risk was endorsed, one consistent with the policy itself. There was, therefore, no insurance on the sloop intended by plaintiffs to be insured. In support of these views, we cite: 1 Parsons Marine Insurance, pp. 322 to 328, inclusive; Douville v. Sun Mutual Insurance Company, 12 La. An. p. 259; Orient Mutual Insurance Company v. Wright, 23 How. p. 401; and Sun Mutual Insurance Company v. Wright, 23 How. p. 412.

The judgment appealed from is correct, and it is, therefore, affirmed.

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*Court of Appeals, Third Circuit, Parish of St. Landry.*

ESTATE OF FRANK P. BESSINGER v. L. DUPRE, Curator.

Where the *curator* of a vacant estate files a "tableau of debts," praying for its publication and homologation, and a distribution of the funds in accordance therewith, and its publication is ordered by the court, as also the distribution as prayed for, "after due homologation" of the tableau; and where the natural tutrix, representing the heir, duly recognized, presents a petition praying for the rescission of said order and the dismissal of the *curator's* petition; and where the issues the tutrix presents were tried, and the relief she demanded was denied; held, that the decree against said tutrix is not appealable.

*Appeal from Thirteenth Judicial District Court, Parish of St. Landry. Hudspeth, Judge.*

*K. Baillio and J. N. Ogden* for relator, appellant.

*L. Dupre and B. A. Martel* for defendant.

The *curator* of Bessinger's estate filed a "tableau of classification of debts" with his petition, demanding its publication

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*Estate of Bessinger vs. Dupre, Curator.*

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and homologation, and "that after due homologation he be authorized to pay said debts in accordance therewith." The order prayed for was granted. Mary Williams, natural tutrix of her own minor child, also natural child and judicially recognized heir of deceased, presented her petition, alleging that she alone, representing her ward, was entitled to administer this estate, to file all accounts, etc.; that the *curator* filing this account was *functus officio*, and not entitled to administer. Her petition concludes by praying for the dismissal of the *curator's* demand and the rescission of the order he had obtained. To this petition the *curator* answered, denying the right of the tutrix to demand such rescission, averring that he had received no funds of the estate, but had filed said tableau in accordance with vouchers furnished him by his predecessor, Elbert Gantt, late public administrator, and that he, himself, can only be discharged by the court, regularly and after a full performance of all his duties and upon suit formally brought for that purpose. He prayed for the discharge of the motion of tutrix.

MOORE, J., after stating pleadings and facts.—This judgment, it seems, was not signed, but was entered on the minutes of the court.

From this interlocutory decree, the tutrix has taken this appeal.

A motion to dismiss the appeal has been filed in this Court by the *curator* of the vacant estate, appellee, on the ground "that the interlocutory judgment works no irreparable injury to appellant."

The only question before us is that raised by the motion to dismiss the appeal.

The merits of any controversy that may arise over the tableau filed by the *curator*, or over any other act of his in relation to the final settlement of the estate, is not before us, and we will not extend our investigation of the case in that direction.

It is a well settled principle of the law regulating proceedings in courts of justice in this State, that unless an interlocu-

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tory judgment may cause the party against whom it is rendered an irreparable injury, no appeal will lie from it. See C. P. Art. 566; 20 La. An. 344, 394; 21 La. An. 453, 634. In the case last cited, in dismissing the appeal, the court uses this language, "the law does not favor the bringing up of cases by fragments, and, therefore, has provided no appeal from interlocutory decisions, unless they work irreparable injury."

To the same effect are the decisions rendered in the cases to be found in the 28 La. An. 262; 29 La. An. 805.

We cannot perceive that any injury, irreparable in its nature, may result to appellant from the judgment complained of.

The tableau filed by the *curator* is before the District Court, subject to all objections that the plaintiff or any other person in interest may have reasons to urge against it.

The effect of the order to give public notice of the filing of the tableau and of the petition for the homologation thereof, can certainly work no injury of any kind; on the contrary, it places all parties who may have an interest in the estate, upon their guard; they are thereby notified of the movements of the *curator*, and afforded an opportunity of urging against the tableau any objections that may exist thereto. That part of the order which authorizes the *curator* to pay the debts placed by him on the tableau "*after it shall have been homologated*," can work no injury of any description to plaintiff, for it does not conclude her; she may, by simply filing exceptions or oppositions to the tableau, prevent the homologation thereof, and prevent that part of the order from taking effect. The authority to pay, granted by the order, is dependent upon the condition precedent, that the tableau be homologated by a judgment of court, and until this was done, the *curator* was without right or power to pay any claim placed on the tableau.

No injury then, it seems to us, of any kind, much less one irreparable in its nature, can result to the appellant.

We are of opinion that the motion to dismiss the appeal should prevail.

Appeal dismissed.



## No. 43.

## MRS. JOSEPHINE DECUIR v. DR. LEON FERRIER.

1. Where a decree of court authorizes a person to do certain things in which others are interested, and by authority thereof he performs a portion of what the decree permits, he, by such partial performance, accepts the charge, and is bound for the complete execution thereof.
2. Where a person advisedly complies, either partially or entirely, with the obligation of a judgment or contract, he will not be heard declaring that he was no party to such judgment or contract.
3. Where a person, nominally a party to a judgment, when sued for its nullity, defends the action upon the ground that such judgment is valid, and succeeds in maintaining it, he is estopped from subsequently declaring that it was null, as to himself, for want of citation or representation.
4. Where a person agrees to satisfy his obligation to an estate, by distributing the sum he holds amongst its creditors, taking their receipts, such an agreement is not in the nature of a promise to pay the debt of another, such as is required by statute to be evidenced by writing.
5. Where, upon certain admissions in open court, the debtor of an estate is authorized to distribute the fund represented by the debt amongst the creditors of such estate, taking their receipts, it will be implied, without special mention, that such debtor made a proposition, of which such decree was the acceptance, and he will be held accordingly.

*Appeal from the Fifth District Court. Rogers, Judge.*

*E. K. Washington* for plaintiff, appellant.

*Edward Philips* and *T. M. Cooley* for defendant.

C. B. Singleton, Esq., judge *ad hoc, vice* Rogers, judge, refused, concurred in the opinion and decree rendered in this case.

MCGLOIN, J.—Plaintiff sues defendant for \$588 due her as a creditor of the succession of Antoine Decuir, deceased. Certain property of that estate was sold at public auction, and bought in by defendant for \$23,175, upon twelve-months' bond. A tableau distributing this fund was filed and disposed of by a decree approving certain claims, amongst others that of plaintiff, and rejecting others, and concluding as follows:

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"It appearing from admissions in open court, that Leon Ferrier, one of the creditors of said succession, represents the other creditors, and that *he* executed the twelve-months' bond for the purchase price of the principal property of the succession, it is ordered on his filing the receipts of the several creditors named in said final tableau, that the twelve-months' bond so executed by him, and also the twelve-months' bond for \$350, made by ——— Mitchell, be delivered to him for cancellation and collection, and that, thereupon, the administratrix (plaintiff herein) be discharged from her trust, and her bond cancelled," etc.

Although it is not clearly so stated, yet we consider that this portion of the decree implies a proposition by defendant to pay the debts, and its acceptance by the court and all parties interested, and the assumption of these debts by him, as a portion of the purchase price of the property, and that it fixes upon defendant this responsibility. If, however, there were doubt upon this question, there can be none upon the proposition, that the obligation, if inchoate, would be made perfect against defendant the moment he proceeded to avail himself of the permission accorded.

The course through which, under the law, the transaction, were it not for this decree, would have reached a conclusion, would have been for defendant to have met his obligation by paying, at maturity, \$23,175 into the hands of the administratrix, to be by her distributed under the sanction of her oath and bond. When he, by authority of this decree, broke into that fund, and assumed the functions of the administratrix in its distribution, he accepted the trust imposed upon him by the judgment, and was bound to execute it completely. He could not accept its terms in part and reject them for the remainder.

The evidence shows, we think, payments to other creditors by a Mr. Lafitte, who seems to have controlled the financial management of this business. At all events, when plaintiff, in another suit, demanded the nullity of this very decree, defend-

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ant answered, making amongst others the following averments: "Said judgment was *in all respects true and valid*, and highly beneficial to the petitioner individually, and most advantageous to said succession, and that, *soon after its rendition, said judgment was fully executed by this respondent, by paying the several sums directed to be paid*, and that all parties acquiesced in its rendition and execution, as aforesaid."

It is shown that a check was tendered to plaintiff, but refused, and we may, upon the faith of defendant's own averment, as above recited, take it for granted that the others are paid. Certainly this was an acceptance, were such necessary, clear and irrevocable, of the terms of this decree by Dr. Leon Ferrier.

Nor do we see how those prohibitory laws, excluding verbal promises to pay the debt of another, can be made applicable. It was not the debt of another which defendant was to pay, but his own, as evidenced by his twelve-months' bond. His assuming the distribution of the fund was but binding himself in favor of third persons to a certain method of discharging his obligation, just as a purchaser often assumes, as a part of the price, liens and mortgages, or even an unsecured debt of his vendor, or as the holder of another's funds may bind himself by promises of acceptance, verbal or written, to pay the drafts of his principal.

Before this Court defendant contends that it is not shown that he was a *party* to that decree. We can conceive of no stronger ratification and estoppel barring a person from setting up that he was no party to a judgment, or even contract, than his own voluntary and advised execution, either in whole or in part, of the obligations it imposes upon him. It is as satisfactory and conclusive as the ratification resulting where a principal, in the same manner, executes the contracts entered into by an agent beyond the scope of his authority. Again, when the nullity of this decree and the proceedings thereunder was demanded against him, he solemnly averred, before a court of justice, that it was valid, advantageous to,

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and acquiesced in, by all parties. He was heard upon these averments, and secured a judgment thereon, maintaining its validity and binding force. Surely, having against this very plaintiff advocated and maintained this decree, and defeated her effort to destroy it, he cannot now be heard, himself, attempting to stamp it with nullity for want of notice to himself and others in interest.

The judgment appealed from is, therefore, reversed, and judgment is now rendered in favor of plaintiff, and against defendant, for \$588, with legal interest from January 16th, 1872, with costs of both courts.

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*Court of Appeals, Third Circuit, Parish of St. Landry.*

PAGE & MORAN v. JOSEPH VALERY.

1. Where the notary protesting a draft, unable after diligent enquiry, to ascertain the address of the drawer, directed the notice of protest to him, at the place where the draft was drawn or dated; held, that this was sufficient.
2. The general denial imposes upon the holder of such a protested draft suing thereon the obligation of establishing due notice.
3. Where, however, in addition to the general issue, payment is plead, the defence will be restricted to that plea, and if that is not made out, judgment must go for plaintiff.
4. In the absence of written agreement, no more than legal interest can be recovered.

*Appeal from Thirteenth Judicial District Court, Parish of St. Landry. Hudspeth, Judge.*

*Jos. M. Moore* for plaintiff, appellant.

*L. Dupré* for defendant.

Kenneth Baillio, Esq., member of the bar, sat in this case as judge *ad hoc*, *vice* Moore, judge, recused, having been of counsel.

Suit upon a draft for \$280, payable in 60 days, drawn by defendant on A. A. Mouton, and accepted and not paid at maturity. The answer was a general denial and plea of payment.

IRION, J. — After reciting pleadings and facts His (defendant's) counsel contends in argument that no judgment can be rendered against him, because the plaintiff failed to show that a notice of protest had been sent to defendant and addressed to him at his nearest post-office. No other defence is made by counsel in his brief.

He very properly contends that under a general denial proof of protest and a proper notice must be made, but the burden of this proof is thrown upon the plaintiff only when the defence is confined to a general denial alone. When, in addition to a general denial, the defendant pleads payment, his defence must be confined to the latter, because it is inconsistent with any other. The Supreme Court in *Gailes v. Schooner Osceola*, 14 La. An. 54, said, "the general denial was waived by the pleas of payment and novation. These pleas admitted the former existence of the draft, and the defendant thereby assumed the burden of proof to show that the debt had been extinguished in one of the modes pleaded in his answer."

In *Landry, Curator, v. Delas, Lorio & Co.*, 25 La. An. 182, the Court said, "the plea of payment admits the existence of the debt, whose continuance will be presumed, unless the defendants make good their plea."

Applying these principles to the case now before us, it is clear that the defendant has waived any defence he might have made under the general denial, and must show that he has paid the draft sued on, or judgment must be rendered against him. We have failed to find any evidence in the record to satisfy us that the debt has ever been paid, nor does the counsel for defendant in his argument contend that it has.

It appears, however, that the notice of protest was properly addressed. The depositions of Theodore Guyol establish the fact that after diligent enquiry the post-office of Joseph Valery could not be ascertained, and the notice was addressed to the place at which the draft was dated. This was in compliance with section 2510 of the Revised Statutes. Objection was made to the consideration of these depositions, but we are

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satisfied that under the provisions of Act 29 of the General Assembly of 1880, they are properly in the record and form a part thereof. In the absence of a written agreement, more than the legal interest cannot be recovered.

Judgment reversed, and now rendered for plaintiff, for \$280 with legal interest from March 14th, 1874.

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No. 44.

JOHN I. ADAMS & Co. v. ALFRED MOULTON.

1. An exception of no cause of action admits for the purposes of its trial the allegations of the petition.
2. A creditor holding a special mortgage or privilege cannot prevent the sale of the property affected, by a subsequent mortgagee, or by an ordinary creditor, if the price obtained be sufficient to satisfy his prior claims.
3. It is only when property so sold brings less than prior special mortgages and privileges, that the sale is null.
4. A bid at forced sale is only for the absolute value of the property. The purchaser owes or assumes nothing beyond the amount of his bid.
5. The standing crop upon land at the time of sale passes as a part of the property to which it is attached, and the bid covers such crops, as well as the soil and other improvements.
6. Where a party takes all, or a portion of the proceeds of a judicial sale, he ratifies the same, and is estopped from disputing its validity.
7. Where one of several owners of a concurrent mortgage, he holding also at the same time another claim secured by a special and superior privilege, in the division of the fund realized by the sale of the property, takes his *pro rata* of the same, as a mortgage creditor, and allows his fellow-creditors to do the same, there is an abandonment of such superior privilege.
8. Such a partition of proceeds, however, if made in error of fact, might by proper proceedings be rescinded, but such rescission must be demanded in a suit regularly brought for that purpose.
9. To such an action all the persons participating in the distribution are necessary parties.
10. Before instituting such a suit, the plaintiff should return or tender the return of what he has received, so that the condition of affairs as they stood before the distribution might be itself restored.

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11. Such a transaction could not be rescinded as to one of such participants, and not as to the other; therefore, the tender of restitution should be made to both.

*Appeal from Fifth District Court. Rogers, Judge.*

A. L. Tucker for plaintiff, appellant.

Breaux & Hall for defendant.

C. B. Singleton, Esq., member of the Bar, sitting as judge *ad hoc*, in place of Rogers, judge, recused, concurred in the opinion and decree delivered in this case.

MCGLOIN, J.—Plaintiffs allege, substantially, that the crop of 1875, on the Anchorage plantation, was pledged to them for advances made thereon, and amounting to \$944 07; that their lien was duly recorded; that on the 3d of July, 1875, said Anchorage plantation was sold under a mortgage held concurrently by plaintiff, defendant and a third person; that said plantation, the crop of 1875 then standing on it, was adjudicated to defendant for \$11,000 cash, which sum was distributed *pro rata* among the aforesaid concurrent mortgagees, including plaintiffs; that, owing to their inadvertence, plaintiffs had made no separate appraisalment of the crop; that their attorneys overlooked the privilege, "through forgetfulness and error of fact, when they received and receipted for the *pro rata* due to petitioners upon their said mortgage claim;" that they offered to return said money, which offer was not accepted; and they sue defendant personally for said claim, \$944 07, because he "received to his own use and benefit all of the said crops so affected with their said lien and privilege."

This petition was met by the exception of no cause of action, which was maintained below.

Such an exception, of course, admits, for the purposes of its trial, the facts alleged. The sale seems, however, upon the showing of plaintiff, to have been legal and effective. Even if plaintiff's claim was secured by a valid special privilege anterior to the mortgages, to satisfy which the property was sold, the price was sufficient to meet it. A prior mortgage or privi-

lege does not prevent a sale, by a creditor holding one that is inferior, or in fact holding no lien but that of seizure upon the property, where the price is sufficient to satisfy all claims entitled to priority. *Carron v. La. State Bank*, 7 Martin, N. S. 281; *Heber v. Heirs of Babin*, 6 Martin, N. S., 614; *Vanhilla v. Husband*, 5 Rob. 496; *Bludworth v. Hunter*, 9 Rob. 256; *Pickens v. Webster*, 31 La. An. 870.

It is only against sales, where the price bid is *less* than the amount of prior special mortgages and privileges, that the law decrees nullity. 1 Martin, N. S., 603; 3 Martin, N. S., 604; 4 Martin, N. S., 154; 7 Martin, N. S., 381; 6 Rob. 107; 6 Rob. 380; 7 Rob. 406; 9 Rob. 256; 10 Rob. 65; 12 Rob. 130; 1 La. An. 32; 1 La. An. 426; 2 La. An. 971; 2 La. An. 617; 5 La. An. 574; 6 La. An. 394; 7 La. An. 298; 7 La. An. 614; 9 La. An. 214; 9 La. An. 216; 15 La. An. 630; 27 La. An. 47; C. P. 684; *State ex. rel. v. Recorder*, 1 McGloin, 190.

Nor is the bid at such a sale over and above the amount of the prior special mortgages and privileges. It is for a definite sum, and constitutes the entire price. *Mounet v. Williamson*, 7 Martin, N. S., 383; *Balfour v. Chew*, 4 Martin, N. S., 161; *Pepper v. Dunlap*, 16 La. 170; *Fortier v. Slidel*, 7 Rob. 403; *Suc. Triche*, 29 La. An. 385.

The standing crop upon the property at the time of the sale passed with the soil as a part of the land to which it was attached, and the price bid and paid included and covered such crop, which went to the purchaser by virtue of his adjudication. C. C. Art. 456; *Bludworth v. Hunter*, 9 Rob. 256.

Therefore, beyond the obligations imposed by law upon the defendant as such purchaser, he incurred no liability towards plaintiff for taking and disposing of, as his own, the crops affected by plaintiff's privilege.

Even if, under ordinary circumstances, it would have been the duty of the defendant to have retained in his hands a sufficient sum out of the price to satisfy the privilege of plaintiff, and a failure so to do would not release him (*Sturges v. Taylor*, 285), yet where, as in this case, the privilege creditor has



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ratified the action against which he complains, the principle can have no application. According to the showing of their own petition, John I. Adams & Co. were holders of a portion of the concurrent mortgages which consumed the price, and, as such mortgage creditors, they received their *pro rata* of the fund resulting from the sale. This is clearly an estoppel, preventing them from impeaching or complaining of the transaction. *Sittig v. Morgan*, 5 La. An. 574; *Factors' and Traders' Ins. Co. v. DeBlanc*, 31 La. An. 103; *Boubede v. Aymes*, 29 La. An. 275; *Thomas v. Scott*, 3 Rob. 256; *Headen v. Oubre*, 2 La. An. 142; *Livaudais v. Livaudais*, 3 La. An. 455; *Provosty v. Carmouche*, 22 La. An. 135; *Slocomb v. Williams*, 23 La. An. 245. If this partition of the proceeds were made by the counsel for plaintiffs in error of fact, such as is recognized by the law as sufficient to rescind contracts, upon proper showing, and in an appropriate proceeding, they might be entitled to relief. 31 La. An. 103, *Factors' & Traders' Ins. Co. v. DeBlanc*. The remedy, however, is not the one sought to be enforced in this case. The transaction must stand until it be duly rescinded by judgment in a suit brought for that purpose. To such an action the third person, who, as holder of a concurrent mortgage, participated in the settlement, and received portion of the proceeds, should be made party. *Sittig v. Morgan*, 5 La. An. 574.

Furthermore, before instituting such a suit, plaintiffs would be bound to put the defendants in *mora*, by tendering the restoration of what they had themselves received, so that the condition of affairs might be made the same as they were before the settlement of which they complain. *Tippet v. Jett*, 3 Rob. 316; *Walden v. City Bank*, 2 Rob. 179; *Van Week v. Rest*, 14 La. An. 56; *Latham v. Hickey*, 21 La. An. 425; *Stewart & Jewett v. Pressly*, 22 La. An. 506; *Ferari v. Lambeth*, 11 La. 102; *Gorham v. Hayden*, 6 Rob. 450; *Castellano v. Peillon*, 2 Martin, N. S. 471; *Janin v. Franklin*, 4 La. An. 198; *Barnett v. Bullard*, 19 La. 283; *Duranton*, vol. xii, Nos. 561, 562; *Marcadé*, vol. iv, p. 575, No. 901; *Mourlon*, vol. ii, p. 675

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The tender of restitution in such a case as this should be to both defendants, as the transaction could not be rescinded as to one, and stand for the other. They were both entitled, in case the rescission were decreed, to have the fund restored into the control of the proper court, where they might test and resist the enforcement of plaintiff's privilege, in the same manner as they would or could have done had plaintiff's consent not obviated its necessity.

Whether the bare fact that one who, knowing the character of his rights, permits the recollection thereof temporarily to escape him, justifies the rescission of a contract for error of fact, upon his part, is a question which we do not feel called upon to determine.

Judgment affirmed.

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No. 127.

D. F. KENNER v. ALLEN & SYME.

1. Where the place of delivery is not fixed by stipulation, the law directs that it shall be made at the place where the object of the contract is at the time of sale. C. C. Art. 2484.
2. Where the place of delivery was not declared to be material, and without intent to defraud or deceive, the property is stated to be at one place, when in fact it was at another, such error will not avoid the contract.
3. Where, through inadvertence the goods sold have been removed after the sale from the place at which they were at the moment of agreement, this circumstance will not justify the rescission of the contract.

*Appeal from Civil District Court, Division D. Rightor, Judge.*

*Alfred Grima* for plaintiff.

*Gilmore & Sons* and *Ellis & Ellis* for appellants.

ROGERS, J.—The commercial firm of Allen & Syme, on the 8th October, 1880, purchased through a broker 190 sacks of rough rice, weighing 34,305 lbs., at \$3 75 per barrel of 162 pounds. Defendants aver that in sending for the purpose of sampling said rice, and to ascertain if it corresponded with the description of the rice which they had purchased, and to haul it to the warehouse, they were unable to obtain view or

delivery of the same, whereupon they purchased rice elsewhere, and they had a right to consider, and did consider, the contract at an end by the failure of the seller (plaintiff) to deliver the rice.

At the time of the sale nothing was said as to the place of delivery, and defendants urge in their argument that they purchased the rice to be delivered on the levee from the steamboat *Whisper*, and that it having been removed from that place, the sale was not consummated by delivery.

This was not set up as a defense in the answer. In fact, it is distinctly alleged that defendants received "an order on the steamboat *Whisper* for the same, and an order on Warner & Hoelzel for part thereof." The evidence shows that when the broker first called with the samples and exhibited them to defendants, they offered \$3 75 per 162 pounds. There is no doubt that the samples were examined by defendants to their satisfaction, and the broker, after the examination, returned with the samples to make report to his principal of the offer. He returned some hours after with the samples, public weigher's certificate, and the acceptance of the offer by the plaintiff, evidenced by a contract signed by his broker; an order was also given at the same time on the steamer *Whisper* for the 190 sacks of rice. It was discovered by plaintiff's agent a short time after this that some eighty or ninety sacks had been hauled from the levee through mistake to the warehouse of Warner & Hoelzel, and another order for this number was at once sent to defendants with a note of explanation. Article 2484, C. C., is relied upon as sustaining defendants.

"The delivery must be made *on the place where the thing* which is of the object of the sale *was at the time of such sale*, if not otherwise agreed upon."

If we must give a strict and technical application of this provision, we should say, that the evidence discloses that at the time of the sale, *three or four o'clock P. M.*, of October 8th, when the contract proposed by defendants had been accepted by plaintiff actually and finally, the thing sold was

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partly on the levee and partly in the Warner & Hoelzel warehouse, for defendants assert the removal had taken place at *two o'clock P. M.* of that date.

Delivery is the essence of the contract of sale; but parties may stipulate how such delivery shall be made. In cases where no such stipulations are made, the law provides the manner, in order that agreements made in good faith shall not be arbitrarily set aside at the caprice or design of one of the contracting parties. There is no doubt plaintiff's broker believed that the sacks of rice were on the levee when he gave the order; in truth, he was mistaken, for a part of them had been removed. He is not chargeable with bad faith or deception. It was not considered material by defendants, for when he sent the second order with his explanation, no protest was made, nor was a claim for rescission of the contract suggested. It was an error of fact, not such a one as would invalidate the contract; to have such an effect the error must be in some point, which was a principal cause for making the contract. C. C. 1821, 1823. Nothing in the record shows that defendants were in the least affected by the situation of the rice; there was no injury, no inconvenience, rather that the warehouse afforded greater protection to the grain, and more facility for its being properly sampled.

“Le vendeur ne peut pas, sans une juste cause, déplacer l'objet mobilier vendu, et rendre par conséquent l'enlèvement plus difficile et dispendieux pour l'acheteur. S'il le fait, il doit indemniser ce dernier *de ce qu'il lui en aura coûté de plus* pour l'enlèvement.”\* 1 Troplong on Sale, § 291; Pothier, Contract of Sale, § 52; Pothier, Oblig. 548.

And this we understand to be the general commercial law as adopted from the civil law. Benjamin on Sales, Ed. 1868, pp. 504, 505.

We believe the judgment appealed from is correct, and it is, therefore, affirmed.

Rehearing refused.

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\* The seller cannot, without just cause, change the location of the movable sold, and thereby render its removal more difficult and expensive to the purchaser. If he so does, he must indemnify the latter for the extra expense of such removal."

## No. 100.

GEORGE CANBY v. MRS. L. A. GERODIAS AND LOUIS LECONTE.

1. If a party applying for an injunction, in his petition, cumulates with any of the grounds which, under Code of Practice, Art. 739, justify the issuance of the writ without bond, other grounds or facts which are not in the enumeration of that article, he must furnish bond.
2. Upon the trial of such a suit, damages under the statute can be accorded against the plaintiff and his surety, without proof, only up to the amount of twenty *per centum* of the judgment enjoined. This *per centum* must cover all damages, beside interest, unless the proof establishes more.

*Appeal from Third District Court. Monroe, Judge.*

*Lacey & Butler* for plaintiff.

*F. Michinard* for defendant and appellant.

ROGEES, J.—The defendant, Mrs. L. A. Gerodias, obtained an injunction restraining a writ of seizure and sale obtained by plaintiff. Louis Leconte was the surety on the injunction bond. The injunction was decreed to have been wrongfully issued. This is a suit on the bond. Judgment was given for plaintiff, and Louis Leconte, the surety, alone appeals.

It is contended that the injunction was obtained by Mrs. Gerodias on allegations strictly within the purview of C. P. Art. 739, and no bond should have been required. The petition upon which the injunction was granted was not restricted in its allegations to the provisions of Art. 739 C. P.; it embraced other and distinct averments, which fortified the right to the writ. Under these circumstances, the judge properly required a bond. 31 La. An. 112.

The judge *a quo* considered this a case in which the full penalty, permissible under the law, should be awarded. From an examination of the testimony taken on the trial of the injunction, we are not disposed to differ with him. Art. 304 C. P. provides that in case the injunction be dissolved, the court shall condemn plaintiff and his surety, jointly and severally, to pay defendant in writ interest at the rate of ten

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per cent per annum on the amount of the judgment, and not more than twenty per cent as damages, unless damages to a greater amount be proved.

The judge allowed one hundred and sixty-five dollars and ninety-five cents, and twenty per cent damages on the judgment enjoined, and a further sum equivalent to two per cent interest on \$2000, from June 28th, 1878, to May 24th, 1879. This was an error. It is not shown, that plaintiff suffered damages beyond the amount of the twenty per cent damages allowed by law. 10 La. An. 418. The sum of one hundred and sixty-five dollars and ninety-five cents is, therefore, disallowed, and so far as relates to that sum, the judgment is reversed, and as to the residue, it is affirmed. Plaintiff and appellee paying costs of appeal; defendant, the costs of the lower court.

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## No. 35.

SOCIEDAD UNION ESPANOLA, Etc., v. ANDRES DOCURRO *et al.*

1. Where an "unauthorized corporation" or "private society" is organized for the purpose of creating a common fund and providing a tomb, and the members by its rules are to receive, in return for dues and fees, relief and medical treatment during illness, burial at death, and certain specified assistance to their widows and orphans when left in necessitous circumstances; held, that the death of any member does not dissolve the association.
2. The interest in the assets of a member of such an association, does not pass to his heirs, but lapses in favor of his associates.
3. Where the law requires a suit in favor of such an association to be brought in the name of all its members, the heirs of any such member dying, pending the suit, need not be made parties.
4. This Court, in determining such a cause, will not strike out from the judgment appealed from the shares or *pro rata* of members who have died during the pendency of the appeal.
5. Where the treasurer of such an association furnishes a bond, sometime after his election, he and his surety, members of such association, are chargeable with knowledge of the character and duties of the office he holds, and the nature of the bond required. Even though such bond be

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signed sometime after the election, it will cover funds which have come into his hands at any period after he became such treasurer.

6. Where the surety bound himself as surety for the "funds and other appurtenances" of the association, the bond covers whatever he may have regularly in his hands at the time of executing the same.

*Appeal from Fourth District Court. Houston, Judge.*

*E. Sabourin* for plaintiffs.

*S. Belden* for defendants, appellants.

McGLOIN, J.—Plaintiffs, 246 in number, with the six defendants, composed the Sociedad Union Espanola de Beneficencia Mutua. Defendant, Andres Docurro, on January 4th, 1874, was elected treasurer for two years, and gave bond as such, with his co-defendant, Jacinto Baltar, as surety. He was elected again to the same position for a similar term, and furnished the same security upon his bond. It was discovered towards the end of March, 1876, that he was a defaulter, and he was promptly divested of his office, and the surety duly notified. It appears, by a statement which he furnished, bearing date 31st March, 1876, and other evidence, that the amount of his defalcation was \$717 57. The judge *a quo*, after hearing, gave judgment *in solido* against both defendants, and jointly in favor of all the plaintiffs, for the sum demanded in the petition. The defendants, Docurro and Baltar, appealed. The other four defendants were merely impleaded as such, because they had refused to join as plaintiffs.

It is suggested and admitted upon both sides that since the date of the judgment several of the plaintiffs have died. Defendant, Baltar, appellant, objected to going to trial, until the heirs or representatives of said deceased plaintiffs were made party. The suggestion of these deaths was first made in this Court, November 23d, 1881, and this being the end of June, 1881, there has been ample delay for the publications required in such cases by the rules of this Court. It does not seem clear to us from said rules that one appellee need concern him-

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self about the death of his co-appellee, or that it is the duty of any one but an appellant to make the publication, where it is an *appellee* who has died pending the appeal. We have not, however, found it necessary to determine this question, having reached a conclusion determinative of this issue upon other grounds. The plaintiffs have not formed themselves into an incorporated association under the laws of this State. They are not organized for any purpose, such as makes them a partnership, ordinary or commercial. The company they have formed may be either the "unauthorized corporation" or the "private society," mentioned in La. Civil Code, Art. 446. By that article it is entitled to sue in the name of the individual members, as has been done in this case.

It is true, that the right of succession is one of the privileges that the law accords to corporations, but it does not follow that parties to a private society, or an unauthorized corporation, may not, by stipulation, create what shall be practically such a right. Partners might, in their articles of agreement, provide that the copartnership shall continue after the death of any member, and that the interest of each in the business and assets of the firm shall be a life one only, terminating absolutely on death, the assets, etc., to be divided only amongst such of the members as might survive at a particular date, or who should remain when the firm was actually dissolved. So members of beneficial or mutual insurance companies may specify what sum their widow or heirs shall receive upon their own deaths, and this would amount to a stipulation that the company shall continue unaffected by such decease, and that all the interest resulting from the membership of the departed, shall be this claim of his heir or representative as a creditor upon the association.

The Sociedad Union Espanola de Beneficencia Mutua adopted what were called "regulations and general laws," which, of course, constituted the articles of agreement between all who were, or subsequently became, members. These laws or regulations declare the objects of the society to be "exclu-



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sively to devote itself to alleviate and succor their members in distress and sickness, and procure decent burial at their demise." By other provisions, members, upon admission, pay \$10 as burial or tomb dues, and monthly dues thereafter. This entitles them and their families to medical treatment and pecuniary relief when sick, and decent burial in the tomb of the association. At the death of a married member, leaving a family in distress, by virtue of another clause, a donation, not to exceed \$50, is made to his widow and orphans.

From all this, it is evident that this is strictly a beneficial society; that for their dues the members expect and receive certain stipulated advantages; that the interest of the members and their heirs extends no farther than the right of decent burial in the society tomb; and in case of a married member, leaving a necessitous family, that the widow and orphans receive the donation referred to.

By the agreement which these deceased members have made with their fellows, their deaths were not to destroy this society, or compel its liquidation, and no rights, as members to its assets, were to pass to heirs or representatives. If the first members, who died, opened by their death the way to heirs and representatives to force a liquidation and the division of the assets of this association, including the tomb, it is evident that the survivors could not receive relief, medical treatment and burial by the association, such as they hoped to secure by joining it.

We consider, therefore, that the heirs or legal representatives of the deceased members are not necessary parties to the suit; that by their death the interest of each was divested in the assets of the society, and vested in, or rather lapsed in favor of their former associates; that this state of facts is shown by the record, and has the same effect as if the living plaintiffs, upon the arising of this question, had filed the written assignment to themselves of the interests of their deceased brethren, duly executed before death.

Upon the merits of the case, appellant contends that he, as

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surety, should not be sued until judgment had against his principal and execution returned *nulla bona*. There is nothing in this case which takes it from under the operation of La. C. C. Art. 3051, which authorizes the citing of the principal and the surety in the same suit. It is also claimed that the second bond was not signed by Baltar until March, 1876, whereas Docurro was elected in January, 1876, and the moneys for which he is in default were collected in the interim, and so the bond does not extend thereto. Docurro and his surety were both members of the association, and so charged with knowledge of its laws. The bond was given in accordance with these laws, and was to cover the whole of Docurro's term. When Baltar signed, he signed for Docurro as treasurer, such as that officer was defined in those laws and for the term designated therein. At what particular period his signature was affixed, made no difference, so long as he was not deceived or misled, of which there is no proof. Furthermore, by the stipulations of the bond, he bound himself as follows:

"And now, for better security of whatever funds and other appurtenances I may have in my possession, of the above mentioned association, appears Mr. Jacinto Baltar, as security, for the fulfilment by me of the condition mentioned above, signing this with me," etc.

It will be seen that Baltar bound himself as surety for the "funds and other appurtenances" which Docurro might have in his possession. Under such a stipulation it made no difference when he received the same. Baltar would have been equally bound had it been a balance received by Docurro from a predecessor, or remaining in his hands from his own preceding administration.

The judgment in this case was not in favor of the association as such, although it is not clear that it could not have been so rendered under Civil Code, Art. 446. It is, however, in favor of all these plaintiffs, some of whom are dead. Nevertheless, it appears in the record that the survivors are entitled to the share of their deceased members as well as their own, and,

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therefore, we cannot reduce the judgment by striking out the proportions which would have come to the latter had they survived.

If it had been asked, we would have amended the judgment appealed from, so as to remove all doubt, and make it clearly responsive to our views upon this question. As, however, appellees have not prayed for an amendment, we are at liberty only to approve the judgment appealed from.

Judgment affirmed. Rehearing refused.

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NO. 129.BENJAMIN F. MARSHAL *v.* SIMS, BILLUPS & CO.

1. Where a commercial firm and its members are sued *in solido*, and judgment is so rendered against them, a suspensive appeal, in the name of the firm, with the bond of the firm, brings up the whole case, and suspends execution as to the individual members.
2. Parties sued as composing an existing firm, and condemned as such, may appeal in the firm name. This Court will not examine the record for evidence showing that the firm was in fact dissolved at the date of the institution of suit, or of the judgment.
3. The principle, that upon the dissolution of a partnership its firm name ceases to exist, does not prevent the former partners from using it, by common consent, in any particular transaction.
4. So, where all the members of a dissolved firm join in the use of the firm name upon the bond of appeal, the appeal will not be dismissed.
5. Parties to a contract discovering that they have been deceived or defrauded therein, must, in order to avail themselves of the fraud, so soon as the vice comes to their knowledge, repudiate the entire agreement.
6. If, instead of so doing, they advisedly continue to carry out the contract, objection is waived.
7. A party cannot demand the partial rescission of a contract.
8. He who approves of a contract vicious as to him, or executes it even partially, is estopped from subsequently disputing the contract, because of such vice.
9. An employer, who continues an employee in his service after learning of negligence or misconduct upon the part of the latter, is estopped from subsequently complaining of such negligence or misconduct.
10. No man can complain of a state of affairs which he could have prevented or terminated at any time.

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Oteri & Bro. vs. Home Mutual Insurance Company.

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*Appeal from Civil District Court, Division D. Rightor, Judge.*

*Cotton & Levy* for plaintiff.

*Hudson & Fearn* for defendants, appellants.

ON MOTION TO DISMISS.

MCGLOIN, J.—Defendants are sued as a commercial firm, and judgment is demanded against them as such. The judgment is against said firm and its members, as such, *in solido*. They moved for a suspensive appeal in the name of Sims, Billups & Co., and gave bond in that name. Plaintiff seeks to dismiss the appeal, on the ground that the individual members, condemned as such, *in solido*, have not signed the bond, and so are not appellants, and as to them the judgment cannot be disturbed, and because the evidence shows that the firm is dissolved, and that its name can be used only in liquidation, and not in the execution of such bonds.

I.

Viewing this firm as undissolved, we consider that an appeal taken by it, with bond in its name, brings up the judgment for review, and suspends its execution as to the firm, and its individual members. It is but one judgment that plaintiff has, for one debt, and that is primarily against the firm. The decree against the individual members is secondary and incidental to that against the partnership. The firm's action, in this particular, is as much that of the partners as it can be in any other. If this Court reverses the judgment against the copartnership, the individual members owe nothing, and are also necessarily acquitted.

II.

The petition in this case does not allege the dissolution of this firm; on the contrary, the action is directed against it as an existing copartnership. The judgment corresponds with the prayer, and condemns the partnership and its members as such. The defendants, therefore, have shaped their proceeding for an appeal in accordance with this petition, prayer and decree, and we think that they have done all that is required

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of them. We are invited to examine certain evidence adduced upon the trial of the case, which it is claimed, establishes the dissolution. We do not consider ourselves called upon so to do, for even if it exists, the judgment in the case ignores the fact, and it is from it that the appeal is prosecuted.

Nor would it follow, even if we arrived thus in advance of time, at a conclusion upon this question, favorable to plaintiff, that the appeal should be dismissed. It may be true, that after the dissolution of a firm, its name expresses nothing, and should not ordinarily be employed. This principle, however, can surely not apply to prohibit all the members of a dissolved firm, from using its name upon entering into a particular contract of any nature. There is nothing to prohibit such a thing.

It has been held, so often in the courts of this State, that the wisdom of the ruling is no longer subject to debate, that the appellant need not sign the bond at all, provided the signature of the surety be properly attached. If such be the law, certainly, where all the members of a dissolved firm unite in affixing its name to the bond, in their behalf, it is at least no worse than if they had abstained entirely from signing.

The cases of *Saux v. Lefevre & Co.*, 12 La. An. 757, and *Tupery v. Lafitte & Defarge*, 19 La. An. 296, were suits against dissolved firms as such, and judgments against the members accordingly, with only one member attempting to appeal, furnishing his individual bond. It was held, that the co-partner was a necessary party, either as appellant or appellee. Here, however, the suit and judgment are not as against a dissolved firm, and all the partners have appealed, and furnished bond, making use, for that purpose, of the firm name. The motion to dismiss is, therefore, denied. \*

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*Court of Appeals, Fifth Circuit, Parish of Jefferson.*

STATE OF LOUISIANA *ex rel.* GEORGE PFLUG *v.* F. GARDERE,  
Justice of the Peace, *et als.*

1. Where, by plaintiff's pleading, it appears that an inferior court has jurisdiction of the controversy; that court will not be prohibited from pro-

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\* The opinion on the merits, in this case, omitted here, by inadvertence, will be found at page 223.

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State ex rel. Pflug v. Gardere, Justice, et als.

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- ceeding, upon the simple averment of the defendant, that the amount, or matter involved is beyond the jurisdiction of such court.
2. A defendant, claiming that the inferior court is without jurisdiction, must file the proper exception and provoke a determination of that particular issue in the inferior court itself, before he can apply to one of superior authority for a writ of prohibition.
  3. If the cause be appealable, the remedy of such a defendant, on being cast upon such an exception, is by appeal to the superior court.
  4. In a proceeding to oust a tenant, under provisions of Sections 2155 and 2156, Revised Statutes of Louisiana, the jurisdiction of the justice of the peace is determined by the allegations of the plaintiff, unless the contrary is made to appear by proof.
  5. Where the District Court has not original jurisdiction over a controversy, and the writ is not necessary to aid it in the exercise of its appellate powers, it is without authority to issue the writ of prohibition.

*Appeal from the Twenty-sixth Judicial District Court, Parish of Jefferson. Hahn, Judge.*

*Alfred Shaw and R. G. Harris* for relator.

*Jas. D. Sequin and Francis B. Lee* for respondents, appellants.

BLAKE, J.—Louisa Destrehan, authorized and assisted by her husband, Jos. H. Harvy, instituted before Rivière Gardère, First Justice of the Peace of Jefferson parish, proceedings under sections 2155 and 2156 of the Revised Statutes, to eject George Pflug from certain premises which she alleges she leased him by the month, at forty-five dollars.

George Pflug, in his pleadings, sets up that he leased the premises from which he is sought to be ejected, from the husband of plaintiff, J. H. Harvy, by the year, at five hundred and forty dollars, and that said justice was without jurisdiction, and which plea he urged specially.

Two days after having pleaded to the jurisdiction of the justice, and while said plea was still pending and undetermined, the said Pflug applied to the Judge of the Twenty-sixth Judicial District Court, and upon his sworn averment, that he was a tenant by the year, and had so pleaded before said justice, whose jurisdiction he had declined, nevertheless, he feared that said justice would arrogate to himself jurisdiction and

proceed to adjudicate upon the ejectment suit then pending before him, and which was beyond his competency, the District Judge ordered a writ of prohibition to issue to said justice, enjoining him from proceeding any further in the ejectment suit (save it be to dismiss the same) till further orders from his court.

In answer to the mandate of prohibition, Justice Gardère asserted his right of jurisdiction in the premises, and Mrs. Destrehan denied the right of the District Court to assume original jurisdiction in a matter pending before a justice of the peace.

It seems that the proceedings before the justice were made part and parcel of the petition of relator, in his application for a writ of prohibition.

On trial, the District Judge held that, inasmuch as the relator sets up a yearly lease, exceeding one hundred dollars, the justice of the peace was without jurisdiction *ratione materiae*, holding that the question of jurisdiction as to the amount in dispute, must depend on the allegation of defendant's answer, which, though contrary to the general rules of practice in other cases, is sanctioned by article 2156 of the Revised Statutes.

The prohibition having been made perpetual, this appeal was taken.

From mere inspection of the record, there can be no doubt that Justice Gardère was seized with jurisdiction, both as to the character of the action and the amount of the demand.

The relator, having pleaded to the jurisdiction of the justice of the peace, should have awaited the result of his decision on that plea, and if prejudiced thereby, his remedy was by appeal to the District Court. To sanction his proceeding otherwise, and, as in the present instance, amounts to a virtual ouster of the jurisdiction of an inferior court, to determine issues properly before it.

The District Judge was without authority to issue the writ of prohibition in this case. It was not necessary to aid him in

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the exercise of his appellate jurisdiction, and he had no original jurisdiction in the cause. 14 La. An. 459; 21 La. An. 381; 24 La. An. 459.

The allegation before the justice shows a *prima facie* case of jurisdiction, and it has been decided that a writ of prohibition will not issue on the application of the defendant, that the Court is without jurisdiction. 20 La. An. 239.

The writ of prohibition issues only to a court which takes cognizance of a cause which does not belong to it, or which it is incompetent to decide. La. O. P. 846; 14 La. An. 509.

The rule of the common law, according to "High Extraordinary Legal Remedies, pp. 558-9, No. 773," has been sanctioned by the highest tribunal of our State (29 La. Ann. 806), as applicable to this country, which declares "that the writ will not go to a subordinate tribunal, in a cause arising out of its jurisdiction, until the want of jurisdiction has been first pleaded in the court below, and the plea refused; and where there has been no effort made to obtain relief in the court which it is sought to prohibit, the superior courts will refuse to exercise their jurisdiction by this extraordinary remedy."

We consider the judgment of the District Court a nullity.

It is ordered, that the judgment appealed from be avoided, and that relator pay costs of both courts.

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*Court of Appeals, Second Circuit, Parish of Concordia.*

LOUIS TRAGAR v. JOHN M. CLAYTON.

1. In questions of assessment, jurisdiction is determined by the amount of the tax demandable upon the sum in dispute between the taxpayer and the assessor.
2. Where the law indicates a particular method of contesting assessments, and fixes a delay within which it must be done, the Courts will not interfere in behalf of one who has neglected to comply with its provisions.
3. In a suit to reduce assessments, the burden of proof is on the taxpayer to establish error on the part of the assessor.



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4. The Courts are not, by the law, restricted, *simply* to enquiring into questions of valuation. They may relieve where there have been double assessments, or assessments in the wrong name, etc.
5. Where, upon the visit of the assessor's deputy, the taxpayer suggested a figure as his valuation, which was put down in one column, as required by law, and, upon final action, the assessor himself, in another column, intended for that purpose, places the sum he considers just, the action of the latter is binding.
6. The taxpayer was not relieved, by the conduct of the deputy, from the duty of inspecting the rolls, and making objection within the legal delay.
7. If the sum fixed upon by the assessor is fair, the Court will not reduce, simply because he has reached this just conclusion, in an irregular manner.

*Appeal from the Ninth Judicial District Court. Hough, Judge.*

*Boatner & Mason*, for plaintiff, appellant.

*H. R. Steele*, District Attorney, for defendant.

FARMER, J.—This is an ordinary action to test the correctness of the assessment of plaintiff's property, made in the year 1880. He complains that the assessment of two tracts of land was agreed upon, between himself and the deputy assessor, at \$15,080 and that the column, in the "tax list," for individual assessment was filled up at that sum by the said *deputy*; but that, afterwards, the *assessor* filled up the second column, for assessor's assessment, at \$20,000, without notice to him or other knowledge on his part; and that the "tax roll" was made from these increased figures.

The defendant excepted, that the court had no jurisdiction or authority, in this proceeding, to enquire into the value of the property, the assessment of which is in controversy, for the reason that, the law having provided a special remedy for the relief of those who are aggrieved by the assessment of their property for the purpose of taxation, and no arbitration or appeal having been taken in this case, the same has become final, and cannot be regulated by a direct suit.

Judgment was rendered in favor of the defendant, dismissing plaintiff's demand, from which the latter has appealed to this Court.

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The incorrectness, alleged to be contained in the assessment, is \$5720; and it is admitted that the total taxes, State, levee district, parish, and to pay judgments, exceed five per cent., fifty mills, making the matter in dispute the liability to pay more than two hundred dollars and less than one thousand dollars of taxes.

The plaintiff complains that *he* should have been *notified* that the assessor would not accept the plaintiff's valuation; and that the *assessor should have called* to his assistance the arbitrators provided for by Sec. 18, Act 77 of 1880, as in case of disagreement.

The defendant avers that arbitrators are to be appointed only on the *demand of the property holder*, in case of disagreement, as to the valuation, between the assessor and the taxpayer.

The first step in the assessment of property is the affixing by the taxpayer of his own valuation, in the first column of the "tax list," (Sec. 14); the second is the *actual swearing* to the said list, as required by Secs. 13 and 15; the third is the filling up of the second column of valuation by the assessor; and, then, in case of disagreement, the taxpayers *can* demand an arbitration, Sec. 18. On such *demand* being made, it is the duty of the assessor to have the arbitration made; from which the taxpayer, alleging, under oath, that gross injustice has been done him, may appeal to the courts.

We consider that this mode of procedure is as easy and as favorable to the taxpayer as could reasonably be asked; and that this is the lawful mode to obtain a reduction in valuation. The statutory proceedings should be followed in such cases. 31 La. Ann. 272.

Section 51, Act 77 of 1880, extends further than section 18, and covers the test of other incorrectness; for instance, if the property has been twice assessed to the same person; or, after being assessed to one person and being sold by him, has been again assessed to the purchaser; or if the property is exempt from taxation.

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But we do not think that it was intended by Art. 203 of the Constitution, or by the Revenue Act, 77 of 1880, to constitute the Courts the assessors of the mere valuation of property, except as a last resort to correct the injustice done by the ordinary mode of assessment.

The taxpayer should look after his assessment, *comply with the law himself*; take the proper oath; return the *actually* sworn "list;" and, if the assessor values the property higher than himself, demand an arbitration, *at the hands of his neighbors*; and *then* appeal to the courts.

In this case, the plaintiff did not swear to his own valuation; has not alleged, under oath, that injustice has been done him; and has not sworn or otherwise attempted to prove that the property was worth less than the assessor's valuation.

He complains only that his valuation was not objected to by the deputy assessor, who himself wrote plaintiff's valuation in the "list;" that there was no disagreement between him and the deputy; and that the subsequent increase in the valuation, made by the assessor, was done without his knowledge or consent.

But suppose that the plaintiff had been assessed entirely by the assessor, without having been furnished with any "list" and entirely without his knowledge; still, if the valuation is correctly made by the assessor, the courts could not be called upon to *reduce* it below the actual taxable valuation it possesses.

The assessor is an officer, bound by severe laws to make correct valuations. His deputies and he, himself, should proceed strictly according to law to make formal assessments. But the fact that a deputy filled up *for a taxpayer* the column which the *latter should fill up for himself*, and the fact that the deputy did not object to the figures or otherwise intimate a disagreement, cannot bind the assessor or the State to accept those figures, *unless they are correct*. If increased, the taxpayers all have the same mode of ascertaining that fact and of remedying it. lulled into the belief that their valuations

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Morgan's La. and Texas R. R. and S. S. Co. v. Bourdier and Bellessien.

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are acceptable to the assessor, and thus deprived of the resort to the arbitration, provided for by Sec. 18, the assessor would be censurable; and the Courts would grant relief, under Sec. 51 of said Act and Art. 203 of the Constitution.

But they would grant relief only against an incorrect assessment, notwithstanding the irregularity in the mode of making it; and unless over-valuation be shown, there cannot be a *reduction*. We find no over-valuation in this case. Therefore it is adjudged and decreed that the judgment of the District Court is affirmed, with costs of appeal.

Rehearing refused.

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*Court of Appeals, Fifth Circuit, Parish of St. Mary.*

**MORGAN'S LA. AND TEXAS R. R. AND S. S. COMPANY v.  
BOURDIER AND BELLESSIEN.**

1. When the law, authorizing the expropriation of private property for the use of a railroad company, requires the corporation to present an application to the judge for appraisal, and to notify the owner of the place and time at which such application is to be presented, and such notice is not given, the proceedings are null.
2. In actions, joint in their nature, all the joint defendants must be cited.
3. Lands owned by two or more persons, in undivided interest, cannot be expropriated, unless all parties interested in the title are made party.
4. Under such circumstances, there cannot be an expropriation of the undivided interest of only one of the co-proprietors.
5. And each of the owners in common is entitled to citation and notices of application and proceedings for appraisal.

*Appeal from the Third Judicial District Court for the Parish of  
St. Mary. Fontelieu, Judge.*

*Don Caffrey*, for plaintiff, appellant.

*B. F. Winchester* and *A. L. Tucker* for appellees.

The opinion of the Court was concurred in by Hon. F. S. Goode, judge *ad hoc*, acting in the place of Dumartrait, judge, recused, having been of counsel.

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Morgan's La. and Texas R. R. and S. S. Co. v. Boardier and Bellessien.

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**BLAKE, J.**—This is an action instituted by the plaintiffs under the provisions of their charter (Act 37 of the General Assembly of 1877) to expropriate for the use and purposes of their company certain lands belonging to the defendants, so as to connect, by means of a switch or lateral branch, the town of Pattersonville with their main road, and for a depot on the Atchafalaya River, adjacent to said town.

The first objection, urged by the defendants by way of exception, is, that a copy of plaintiffs' application for the appointment of commissioners of appraisal, with a view to expropriate and notice of the time and place when such application was to be presented to the judge was not served, as required by paragraph 5 of section 17 of plaintiffs' charter.

The sheriff's return shows that the application and notice in question were served on one of the defendants only, Trophine Bellessien; and this return is relied on to establish the requisite service, the want of which forms the basis of defendants' first ground of exception.

Plaintiffs in their petition aver that the property sought to be expropriated belongs to the defendants, and ask that both of them be cited.

Section 17, paragraph 5, of plaintiffs' charter, provides "that a copy of the application for the appointment of commissioners of appraisal, and notice of the time and place the same will be presented, must be served on all persons named in said application as owners, or persons interested."

There is no evidence before us to show that Jean Bourdier, one of the joint owners of the property sought to be expropriated and a co-defendant herein, was notified as required by the above quoted section of plaintiffs' charter, nor does it appear that he was even cited as provided for by general law, and in compliance with the prayer of plaintiffs' petition.

It is well settled that in joint actions all persons in interest must be made parties to the suit. Hennen La. Dig., p. 1129, §§ 3 and 11 and authorities there cited.

The subsequent answer of the defendants did not cure this

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defect of want of citation, inasmuch as it was filed with full and entire reservation of all of their rights under their exceptions, already presented.

It follows, therefore, that for failure to comply with this necessary formality of citing both of the joint owners, all proceedings had herein are irregular and illegal; and furthermore, inasmuch as the property in controversy is held in indivision, it follows from the very nature of things that the separate and undeterminate share of one of the joint owners alone is not susceptible of expropriation.

This view of the case renders it unnecessary for us to pass upon the numerous other pleas set up by the defendants.

The first ground of the exception which strikes at the very foundation of plaintiffs' action being well founded in law, should have been sustained, and the judgment of the Court overruling the same is erroneous.

Judgment reversed, and case remanded.

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*Court of Appeals, Third Circuit, Parish of St. Martin.*

ALEXANDER WASHINGTON v. J. B. COMEAU, Sheriff, et al.

1. Where, on filing answer, a judgment by default was set aside, but afterwards confirmed, the decree of confirmation is a nullity.
2. The withdrawal of counsel of record after they have filed an answer for the defendants, has not the effect of withdrawing the answer and of restoring the default.

*Appeal from the Parish Court, Parish of St. Martin. Bassett, Judge.*

*J. E. Mouton* for plaintiff.

*F. Voorhies* for defendant, appellant.

IRION, J.—The only question in this case is one of practice. It appears that a regular default was entered; that subsequently an answer was filed and the case continued through several terms of court. Various assignments for trial were

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made, but the defendant, on each occasion, succeeded in avoiding a trial.

It seems that in January, 1878, more than two years after the suit was filed, defendants' original counsel withdrew from the case, whereupon the plaintiffs' attorney moved to make the default final.

A final judgment by default was then entered up against defendants. The defendants appealed, and ask that the judgment be annulled, for the reason that a judgment by default cannot be made final after an answer has been filed.

The counsel for plaintiffs contends that the answer was withdrawn and that by reason of this withdrawal the default was re-established. We cannot assent to this proposition. The Supreme Court, in *Magee v. Dunbar*, 10 La. 550, said: "Though issue be tacitly joined by a default, yet when it is set aside by filing an answer, it is as if it never had existed." It follows, then, that if the answer be withdrawn, a new default must be taken before a final judgment on default can be rendered. In *French v. Putnam*, 14 La. 97, the Court said: "The confirmation of a default set aside is null." In 18 La. An. 187, it was held that no judgment can be confirmed without a previous default.

If, as the Court said in *Magee v. Dunbar*, the filing of an answer set aside the default as completely as if it had never existed, there was evidently no default in this case.

A judgment confirmed without a default is null." 21 La. An. 665. When a judgment has been rendered, confirmed without a default previously taken, it will be reversed on appeal and the case remanded. 19 La. An. 273.

It does not appear by the minutes that the answer was withdrawn. It does appear that on motion of Z. T. Fournette, Esq., the names of Deblanc and Fournette, attorneys for defendants, were stricken from the record; but that did not erase the answer. Under the circumstances, we do not think that a judgment by default should have been made final.

It is, therefore, ordered, adjudged and decreed that the judg-

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ment of the lower court be set aside. It is further ordered that this case be remanded to the District Court for a new trial, and that plaintiffs pay the costs of this appeal.

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*Court of Appeals, Second Circuit, Parish of Catahoula.*

**E. T. WALTERS v. JNO. M. FAULK, Sheriff, et al.**

1. Injunction, like other judicial bonds, are construed with reference to the law under which they are taken; and superadded clauses will be rejected and omitted ones supplied.
2. Where a defendant in injunction, upon motion to dissolve, prays to have the plaintiff therein, and his surety upon the bond, condemned in damages, this is an acceptance of the bond on the part of the creditor.

*Appeal from the Seventh Judicial District Court, Parish of Catahoula. Elam, Judge.*

*Josiah F. Ellis* for defendants.

Plaintiff, appellee, not represented.

**FARMER, J.**—This injunction was dissolved, or rather “dismissed,” on motion of the seizing creditor, defendant, on the ground “that the bond given by the plaintiff is not such as the law requires, it being made payable to the clerk of the Court, instead of the defendant, as required by law.”

Damages were prayed for in the motion; and judgment for damages and interest was rendered against the plaintiff and security *in solido*, in favor of the seizing creditors.

The plaintiff and his surety appealed. Defendant prays for affirmance of the judgment and damages for a frivolous appeal.

The injunction bond recites: “That we, E. T. Walters, as principal, and ———, as his surety, are held and firmly bound unto John Doshier, clerk of the Twelfth District Court, in the sum of five hundred dollars, for the payment of which we bind ourselves firmly and *in solido*.” “The condition of this bond is such that, whereas, the above bound principal has sued out an injunction enjoining the execution of a judgment, styled



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Mrs. E. R. Eubanks v. W. W. Walters *et al.*" "Now if the said principal shall pay all damages sustained by said Mrs. E. R. Eubanks, in case it should be decided said injunction was wrongfully obtained, then this bond to be null and void, otherwise to remain in full force and effect."

We think that this bond is "in favor of the defendant," within the meaning of Art. 304, C. P. True, it declares that the principal and surety are bound to the clerk, for five hundred dollars, for the payment of which they are bound *in solido*. But the remainder of the bond shows that it does not concern the clerk, but does concern the defendant, and that it is conditioned for the payment of such damages as she, not the clerk, may suffer. It cannot be held that the obligors agree to pay the clerk the damages which the defendant sustains.

It is settled that judicial bonds must be construed with reference to the law and the order under which they are taken; and that, in a judicial bond, any clause which is superadded must be rejected and any that is omitted must be supplied. 16 La. An. 174, 196; 15 La. An. 551; 19 La. An. 91; 22 La. An. 536; 29 La. An. 860. This has been applied to injunction bonds. 2 La. 102; 1 Rob. La. 45; 7 La. An. 158; Mason v. Fuller, 12 La. An. 69; V. S. & T. R. R. v. Barksdale, 15 La. An. 466. In the last case, the injunction bond was made payable to the sheriff and not to the seizing creditors. And the condition of that bond was not as strong in favor of the seizing creditor as it is in the present one. There, the Supreme Court held that the bond was sufficient to bind the principal and surety for damages in favor of the seizing creditor. The same construction applies here. In this very case, the seizing creditor claims this bond, as enuring to her benefit, and has prayed for and obtained damages against the surety on it. This is an acceptance of the benefit of the bond; and is inconsistent with the position that it is not a sufficient legal bond.

If it is sufficient to sustain a judgment for damages, on the trial of the motion to dissolve, it is equally sufficient to sup-

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port a final judgment for damages on the merits. Under the authorities, *as they now stand*, we find the present bond is sufficient. Therefore, it is adjudged and decreed that the judgment of the District Court is reversed; that the motion to dissolve is overruled; that the injunction is reinstated; that this case is remanded to the District Court for further proceedings, according to law; and that the appellees pay the costs of this appeal.

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*Court of Appeals, Third Circuit, Parish of St. Charles.*

O. J. FLAGG *v.* EDMOND ROBERTS *et al.*, Appellants.

1. There being no special law governing the opening and adjournment of Courts of Appeal, section 3575 of the Revised Statutes must control; and in the absence of the judges on the first day of the term, the sheriff must adjourn from day to day for three days.
2. The want of the necessary parties to the appeal will *ex proprio motu* be noticed by the Court.

*Appeal from the Twenty-sixth Judicial District Court, Parish of St. Charles. Hahn, Judge.*

James D. Augustin for appellants.

H. F. Sewell and A. Shaw for appellee.

BLAKE, J.—This case was called in its order 'on the docket, on the third day of the term, when the objection was raised by the appellants, that the regular term of this Court having lapsed, any action now taken would be *coram non judice*—the argument being that owing to the absence of both of the judges on the first day of the term, the sheriff, uninstructed by the judges, exceeded the bounds of his authority by opening and adjourning court to the day following; that this was not strictly a ministerial act, but the exercise of a judicial function, which the sheriff had no authority to perform.

Section 3575 of the Revised Statutes, provides: "In case the judge should not appear on the first day of any term, the sheriff \* \* \* shall adjourn the court from day to day, for not more than three days." \* \* \*

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Adams & Co. v. Moulton.

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This is the general law of the State, governing all courts, and in the absence of any special law regulating the opening and adjournment of Courts of Appeal, must control and serve as a guide to sheriffs as to this Court.

The sheriff acted properly, and in simple discharge of his clearly defined ministerial duty, when he adjourned the Court of Appeals to the day following, on failure of the judges to appear on the first day of the term.

The order of appeal in this case was granted on application out of term time, with direction that appellees be cited before the Appellate Court.

It nowhere appears that this formality was complied with, nor in any manner waived, and there is no attempt made to remedy this defect. *Ex proprio motu* we will notice the want of the proper parties to this appeal.

The appellees not being legally before us, we cannot adjudicate upon their rights.\*

It is, therefore, ordered that this appeal be dismissed at appellants' costs.

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No. 44.

## JOHN I. ADAMS &amp; CO. v. ALFRED MOULTON.

1. The sale of property under execution, at the instance of a junior mortgagee, or one holding only an ordinary judgment, cannot be prevented by a creditor with prior mortgage or privilege, if the price realized be sufficient to discharge all superior claims.
2. Sales of property affected by mortgages and privileges, under execution, at the instance of creditors of inferior right, are null only when the price realized is insufficient to meet the superior claims.
3. The bid, at a sale under execution, is for a definite sum and not for the amount stated, with assumption of the mortgages and privileges bearing upon the property.
4. The crop standing upon land at the time of the sale under execution, passes with the land and is covered by the bid.

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\* See *Becker v. Quick*, p. 111; *Grivot v. Waples*, p. 191.—Rep.

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5. Where a creditor participates in the distribution of the proceeds of property sold under execution, he ratifies the same and is estopped from subsequently attacking it.
6. Such a participation, however, if made in error of fact, might, upon proper allegations, be rescinded.
7. Such rescission could only be decreed in a suit for that purpose, to which all who participated in the proceeds are made party.
8. A person asking for the rescission of a contract, etc., must, as a prerequisite to his suit, return or tender what he has received from the transaction complained of and otherwise restore, so far as possible to him, the condition of things as they stood before the contract, etc., that he attacks.
9. Where several persons have participated in the transaction sought to be rescinded, the default must be against all who do not join or acquiesce in the demand.

*Appeal from Fifth District Court, Parish of Orleans. Rogers, Judge.*

*A. L. Tucker*, for plaintiff, appellant.

*Breaux, Fenner & Hall* for defendant.

The opinion of the Court was concurred in by Chas. B. Singleton, Esq., member of the Bar, judge *ad hoc*, *vice* Rogers, judge, recused, having determined the cause below.

MCGLOIN, J.—Plaintiffs allege substantially that the crop of 1875, on the Anchorage Plantation, was pledged to them for advances made thereon, and amounting to \$944.07; that their lien was duly recorded; that on the 3rd of July, 1875, said Anchorage Plantation was sold under a mortgage held concurrently by plaintiff, defendant and a third person; that said plantation, the crop of 1875 then standing on it, was adjudicated to defendant for \$11,000 cash, which sum was distributed *pro rata* among the aforesaid concurrent mortgagees, including plaintiffs; that, owing to their inadvertence, plaintiffs had made no separate appraisement of the crop; that their attorneys overlooked the privilege, “through forgetfulness and error of fact, when they received and receipted for the *pro rata* due to petitioners upon their said mortgage claim;” that they offered to return said money, which offer

was not accepted ; and they sue defendant personally for said claim, \$944.07, because he "received to his own use and benefit all of the said crops so affected with their said lien and privilege."

This petition was met by the exception of no cause of action, which was maintained below.

Such an exception, of course, admits, for the purposes of its trial, the facts alleged. The sale seems, however, upon the showing of plaintiff, to have been legal and effective. Even, if plaintiff's claim was secured by a valid special privilege anterior to the mortgages, to satisfy which the property was sold, the price was sufficient to meet it. A prior mortgage or privilege does not prevent a sale, by a creditor holding one that is inferior, or in fact holding no lien but that of seizure upon the property, where the price is sufficient to satisfy all claims entitled to priority. *Casson v. La. State Bank*, 7 Martin, N. S. 281 ; *Heber v. Heirs of Babin*, 6 Martin, N. S. 614 ; *Vanhille v. Husband*, 5 Rob. 496 ; *Bludworth v. Hunter*, 9 R. 256 ; *Pickens v. Webster*, 31 La. An. 870.

It is only against sales where the price bid is *less* than the amount of prior special mortgages and privileges, that the law decrees nullity. 1 Martin, N. S. 608 ; 3 Martin, N. S. 604 ; 4 Martin, N. S. 154 ; 7 Martin, N. S. 381 ; 6 Rob. 107 ; 6 Rob. 380 ; 7 Rob. 406 ; 9 Rob. 256 ; 10 Rob. 65 ; 12 Rob. 130 ; 1 La. An. 32 ; 1 La. An. 426 ; 2 La. An. 971 ; 2 La. An. 617 ; 5 La. An. 574 ; 6 La. An. 394 ; 7 La. An. 298 ; 7 La. An. 614 ; 9 La. An. 214 ; 9 La. An. 216 ; 15 La. An. 630 ; 27 La. An. 47.

Nor is the bid at such a sale over and above the amount of the prior special mortgages and privileges. It is for a definite sum, and constitutes the entire price. *Mounet v. Williamson*, 7 Martin, N. S. 383 ; *Balfour v. Chew*, 4 Martin, N. S. 161 ; *Pepper v. Dunlap*, 16 La. 170 ; *Fortier v. Slidell*, 7 Rob. 403 ; *Succession Triche*, 29 La. An. 385.

The standing crop upon the property, at the time of the sale, passed with the soil, as a part of the land to which it was attached, and the price bid and paid included and covered

such crop, which went to the purchaser by virtue of his adjudication. C. C. Art. 456; *Bludworth v. Hunter*, 9 Rob. 256.

Therefore, beyond the obligations imposed by law upon the defendant as such purchaser, he incurred no liability towards plaintiff for taking and disposing of, as his own, the crops affected by plaintiff's privilege.

Even, if, under ordinary circumstances, it would have been the duty of the defendant to have retained in his hands a sufficient sum, out of the price, to satisfy the privilege of plaintiff, and a failure so to do, would not release him, yet, where, as in this case, the privilege creditor has ratified the action, against which he complains, the principle can have no application. According to the showing of their own petition, John I. Adams & Co. were holders of a portion of the concurrent mortgages, which consumed the price, and as such mortgage creditors, they received their *pro rata* of the fund, resulting from the sale. This is clearly an estoppel, preventing them from impeaching, or complaining of the transaction. *Sittig v. Morgan*, 5 La. An. 574; *Factors' and Traders' Ins. Co. v. De Blanc*, 31 La. An. 103; *Boubede vs. Aymes*, 29 La. An. 275; *Thomas v. Scott*, 3 Rob. 256; *Hedin v. Oubre*, 2 La. An. 142; *Livaudais v. Livaudais*, 3 La. An. 455; *Provosty v. Carmouche*, 22 La. An. 135; *Slocomb v. Williams*, 23 La. An. 245.

If this partition of the proceeds were made, by the counsel for plaintiffs, in error of fact, such as is recognized by the law, as sufficient to rescind contracts; upon proper showing, and in an appropriate proceeding, they might be entitled to relief. 31 La. An. 103, *Factors' and Traders' Ins. Co. v. De Blanc*. The remedy, however, is not the one sought to be enforced in this case. The transaction must stand, until it be duly rescinded by judgment, in a suit for that purpose brought. To such an action, the third person, who, as holder of a concurrent mortgage, participated in the settlement and received portion of the proceeds, should be made party. *Sittig v. Morgan*, 5 La. An. 574.

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Joyce vs. Kearney & Bernos.

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Furthermore, before instituting such a suit, plaintiffs would be bound to put the defendants in *mora* by tendering the restoration of what they had themselves received, so that the condition of affairs might be made the same, as it was before the settlement of which they complain. *Tippedt v. Pett*, 3 Rob. 316; *Walden v. City Bank*, 2 Rob. 179; *Van Wick v. Rist*, 14 La. An. 56; *Latham v. Hickey*, 21 La. An. 425; *Stewart & Jewett v. Pressly*, 22 La. An. 506; *Ferari v. Lambeth*, 11 La. 102; *Gorham v. Hayden*, 6 Rob. 450; *Castellano v. Peillon*, 2 Martin, N. S. 471; *Janin v. Franklin*, 4 La. 148; *Barnett v. Bullard*, 19 La. 283; *Duranton*, vol. xii, Nos. 561, 562; *Marcadé*, vol. iv, p. 575, No. 901; *Mourlon*, vol. ii, p. 675.

The tender of restitution, in such a case as this, should be to both defendants, as the transaction could not be rescinded as to one, and stand for the other. They were both entitled, in case the rescission were decreed, to have the fund restored into the control of the proper Court, where they might test and resist the enforcement of plaintiffs' privilege, in the same manner as they would, or could have done, had plaintiffs' consent not obviated its necessity.

Whether the bare fact, that one, who, knowing the character of his rights, permits the recollection thereof temporarily to escape him, justifies the rescission of a contract for error of fact, upon his part, is a question which we do not feel called upon to determine.

Judgment affirmed.

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No. 121.

S. M. JOYCE v. KEARNEY & BERNOS.

1. To a suit for revival of judgment against the heirs of a deceased defendant, all the heirs are necessary parties.
2. Where one of the heirs, in such a suit, pleads minority, the cause cannot proceed against the other heirs until the issue of minority be determined.

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Handlin vs. Burnett.

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*Appeal from Civil District Court, Division D. Rightor, J.*

*J. H. Ferguson* for plaintiff, appellant.

*J. O. Nixon, Jr.*, for defendants.

ROGERS, J.—This is an appeal from a judgment refusing to revive a judgment in favor of plaintiff against Alfred Kearney, one of the parties to the original suit. Kearney died in 1877, and citation was served on his widow and children as his heirs. The widow and all the heirs, save one, plead a general denial—the other, Miss Kearney, pleads her minority by way of exception. This exception has never been tried, and remains undetermined. Until this has been disposed of and all the heirs are properly before the Court, the cause cannot be decided.

It is, therefore, ordered, that the judgment in so far as it refers to the widow and heirs of the late Alfred Kearney, be set aside, and the case remanded, to be proceeded with according to law. Costs to await the final termination of the case.

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No. 6.

W. W. HANDLIN, Appellant, v. J. F. BURNETT.

J. J. BURNETT, Garnishee, Appellee.

Where the garnishee denies having property of the defendant in his possession, the question of appeal from the judgment upon a traverse, is determined by the amount of the judgment against the defendant.

*Appeal from the Sixth District Court, Parish of Orleans.*

*Rightor, Judge.*

*J. Carroll Payne* for the Motion.

*E. C. Kelly, Contra.*

ON MOTION TO DISMISS.

ROGERS, J.—Plaintiff obtained judgment against defendant, J. F. Burnett, for the sum of two hundred and seventy-five dollars, with legal interest from January 5th, 1880. J. J. Burnett was made garnishee, and answered the interrogato-



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ries propounded, by declaring that he was not indebted to J. F. Burnett; nor did he have any rights, property or credit belonging to him, under his control; that he had made no compromise or arrangement since the service of interrogatories with defendant. On a traverse to these answers the judgment was in favor of garnishee; plaintiff appeals. Manifestly, the only amount at stake was the judgment obtained against the defendant. Plaintiff could have obtained by his proceedings no greater sum against garnishee; the amount of that judgment was \$275.

It was signed by the District Judge on March 11th, 1880.\*

Appeal dismissed.

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*Court of Appeals, Third Circuit, Parish of St. Landry.*

No. 6.

JAMES M. THOMPSON v. LUDGER LEMELLE *et als.*

1. The regularity of proceedings in bankruptcy, may be enquired into in a State court, where such proceedings form the basis of an action in such court.
2. The mortgages bearing upon the property of the bankrupt, could not be canceled, and such property sold unencumbered without notice to the one holding the same; such notice to be served upon the mortgage creditor, or his agent.
3. Where there has been no such notice, the order of the Bankrupt Court, canceling mortgages is a nullity; and it will be so pronounced, even in a collateral proceeding.
4. The recitations of such an order that there was proper notice to such mortgagees, furnish only *prima facie* evidence of the fact.

*Appeal from the Thirteenth Judicial District Court, Parish of St. Landry. Hudspeth, Judge.*

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\* This Court determined, in *Huger v. Williams*, that it had no jurisdiction over causes decided before August 1st, 1881, and involving less than \$500.—Reporter.

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*John N. Ogden and John E. King* for plaintiff.

*Richardson & Magruder, Jos. A. Breaux and Kenneth Baillio* for defendants, appellants.

Ludger Lemelle and his co-heirs held a conventional and legal mortgage upon real estate of Benjamin Dejean, who, on December 28th, 1868, went into bankruptcy. The land in question was sold by the assignee to George Willard, who subsequently disposed of it to J. M. Thompson. Plaintiffs, on July 12th, 1870, obtained judgment in the District Court of St. Landry against their tutor, François Lemelle, for three thousand dollars, with recognition of their legal mortgage, the latter to take effect from the 7th of January, 1848. The property in question was affected by said mortgage, when it passed to Dejean, who specially recognized it in his act of purchase. He also, at the same time, assumed the debt due to the Lemelle heirs, and specially mortgaged the same property to secure it. These heirs, after Thompson's purchase, attempted to foreclose, but were enjoined by Thompson, on the ground that his vendor, Willard, had acquired, under the sale in the bankruptcy of Dejean, a title free from all mortgages and encumbrances, and that this particular mortgage had been canceled and erased by order of the United States District Court.

Previous to the sale by the assignee, he had obtained, upon his petition and prayer to that effect, an order against François Lemelle, administrator of Ludger Lemelle, to show cause on the 6th of March, 1869, at 11 o'clock, A. M., why the property should not be sold as prayed for, and why all encumbrances should not be erased. It was also ordered that said administrator, and all other persons, be served with a copy of the petition and order, in person, or through their attorneys, or by publication of a copy of said petition and order, three times in the New Orleans Republican.

On the 6th of March, 1869, a decree was entered, declaring that said administrator had been notified, and that the facts recited in the petition were true, and hence, authorizing the

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sale and cancellation of mortgages, as prayed for in the petition of the assignee. After the sale, the purchaser, Willard, and by rule against the Recorder of Mortgages for the parish of St. Landry, secured the erasure of this mortgage from the books of record for the parish; all of which was done before the sale to Thompson. Upon trial in the Court below, the injunction was perpetuated and defendants have appealed.

LEION, J.—After stating pleadings and facts. On the trial of the case several bills of exception were taken, but we do not consider it necessary to notice them separately, as the questions they raise are so intimately connected with the issues on the merits, that they can all be decided together.

It is contended, on the part of the plaintiff, that the proceedings of the United States District Court, in the estate of Dejean, have become final as to defendants, and that they cannot enquire into the regularity of those proceedings in a State court; and further, that the order for the sale of the property contains a judicial finding of facts which cannot be contradicted by the defendants.

In *Willard v. Bringham*, 25 La. An. 600, the Court held: "That a mortgage creditor might enquire into the regularity of proceedings of the United States Court under which property had been sold free of encumbrances, and determine whether or not the order for the sale of the property had been properly rendered." In *Pickett v. Haynes*, 28 La. An. 844, the defendant claimed to be the owner of the land under his title from the assignee in bankruptcy, which he said he purchased free from all mortgages, or other encumbrances. The plaintiff alleged that the sale set up by the defendant was a nullity, because it was made without any notice to plaintiffs, and in fraud of their rights, and was not made in conformity with the requirements of law. They denied that there were ever any legal proceedings had in bankruptcy, and averred that if the recorder of the parish had assumed to cancel their mortgages, his action was illegal and unauthorized, and that the cancel-

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lation should be erased. The Court held that these issues were properly made, and again permitted the plaintiff to enquire into the regularity of the bankrupt proceedings under which the property was sold. In 31 La. An. 745, the Court said: "Three of the defendants contend that the title relied upon by plaintiff is an absolute nullity. If it were, plaintiff replies, it is derived from the execution of a judgment rendered by a Federal court, and its validity cannot be enquired into either by or before a State tribunal. In this she is certainly mistaken. That judgment is not binding on those who are not parties to it, and, as it is made the basis of her action, its validity may be collaterally enquired into." In the case of Shorten v. Booth, 32 La. An. 397, the Court again permitted an enquiry into the regularity of bankrupt proceedings, in order to determine whether or not the property was sold free of encumbrances, and, in view of the fact, that our attention has not been called to a single authority from any court in which the contrary principle is held, we must consider the point as settled by the repeated decisions of our Supreme Court.

It now remains to consider whether or not the proceedings had in the United States District Court, in the estate of Benjamin Dejean, were such as the law requires in order to convey an unencumbered title to the purchaser. It is not, nor can it be questioned, that notice to the mortgage creditor is necessary in order to dispose of property free of his mortgage. The plaintiff in this case relies upon the recitals of the judge in the order for the sale to establish the fact that the necessary notices were given to the defendants.

Under the authority of the decisions to which we have already referred, we are constrained to consider that the recital in the order of sale is only *prima facie* evidence of the fact recited, and may be rebutted by contrary proof. To make this proof, the defendants offered the depositions of Loew, and a copy of all the proceedings in bankruptcy having reference to the sale of the property.

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An examination of these shows that the court ordered that notice of the petition and order be served upon François Lemelle by serving a copy thereof upon him, or by publishing a copy in the New Orleans Republican. Section 5019 of the United States Revised Statutes requires that notice shall be given both by publication in a newspaper, and by written or printed notice, by mail or personally. Bump, in his Law and Practice in Bankruptcy, page 156, says: "As this proceeding specially affects the rights of the secured creditor, he must be properly notified and summoned to appear and protect his interests. This is done by passing an order to show cause, and directing that a copy of such order and petition be served on him. If the notice is served on an agent of the secured creditor, and such agent appears for the creditor, that is sufficient." On page 361 several authorities of other courts than ours are referred to to show that "every creditor must have notice served upon him in the manner prescribed by the act, otherwise he will not be bound by the proceedings." In the 28th La. An. 846, the Supreme Court said: "The question is whether or no the sale interfered with the plaintiffs' rights. And this depends upon whether the plaintiffs were parties to the bankrupt proceedings and to the sale. Unless they were notified of the bankrupt proceedings they were not parties to them and are not bound by them. The only thing which has the appearance of notice is the schedule and publication which is filed by the bankrupt. But this is not sufficient. The parties must be notified, and of this there is no evidence in the record." In 32 La. An. 399, the Court held that though the decree recited that the required notice had been given and ordered the sale free of encumbrances, the proof showed that the mortgage creditors had never been legally notified of the proceedings, and denied their claims only because they had waived the mortgage by their own acts.

The absence of any return of the Marshal, and the depositions of the Clerk of the United States Court, satisfy us that the defendants were never notified of the motion to sell the

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property of Dejean free of encumbrances, and the judgment of the District Court must, therefore, be considered null.\*

Judgment reversed and plaintiffs' injunction dissolved, but without damages, he to pay costs of both courts.

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LOUIS PAGE, President, etc., v. CHAS. CAETANO *et al.*

1. In a cause involving less than five hundred dollars, the District Judge determines finally upon the facts; and he cannot be compelled to order the testimony to be reduced to writing.
2. Where an appellant desires this Court to review the application made by the court *a quo* of the law to all the facts of the case, he may apply for a statement of facts, as provided by C. P. Arts. 602, 603.
3. The reasons for judgment, presented by the judge *a quo*, cannot be treated as a statement of facts, such as contemplated by C. P. Arts. 602, 603.

*Appeal from the Civil District Court, Division D. Rightor, Judge.*

J. S. Hyams for appellant.

A. & M. Voorhies for defendant.

ROGERS, J.—The amount involved in this case does not exceed five hundred dollars. This Court cannot, on appeal, review the facts. Const. 1879, Art.

We find in the record a bill of exception taken by plaintiff, to the refusal of the judge to order the testimony taken in writing.

When the District Judge is invested by law with complete jurisdiction over the facts, we are at a loss to comprehend, under

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\* See, also, *Foster et al. v. Ames et al.*, 2 Bankrupt Reg. 455; *In re Kirkland*, 10 Blatch. 515; *Ray v. Norworthy*, 23 Wall. 128; *Haynes v. Pickett*, affirmed by the Supreme Court of the United States, under rule, March 13th, 1877, Opinion Book, October Term, 1876, p. 635; *Widow Mary Murphy v. Factors' and Traders' Ins. Co. et al.*, No. 6399, late Supreme Court of Louisiana, lately decided. The foregoing authorities are from the brief of Mr. Jas. D. Coleman, attorney for plaintiff in last cited case, which case is now pending before the Supreme Court of the United States, on writ of error to the Supreme Court of Louisiana.—Reporter.

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what rule of court or principle of law he should order the testimony reduced to writing. Such an order might, under the exercise of a sound discretion, or in pursuance of express law, be granted, but when it is manifestly for the purpose, as in this case, of availing a simple desire on the part of one of the litigants, and not necessary, the judge did not err in refusing the application. If, in applying the law to any fact or facts found by the judge, there was error, plaintiff could have obtained a statement of facts under Arts. 602 and 603 of the C. P.; this Court could then have determined whether the law had been correctly applied, but the facts would have remained undisturbed.

At the request of plaintiff's counsel, the judge has signed the following document: "I gave no written opinion in this case—my decision was based on the plea of *res adjudicata*. "The whole question had been examined by Judge Skinner, "who held that Caetano was president. I think that Page "could derive no title to the presidency of the society from "an election by his faction, presided over by himself."

This is clearly the reasons of the judge for his decree—in no sense is it a statement of the facts found by him as contemplated by the law. There being no statement of facts and no assignment of error, the only question before us is the one raised in the bill of exception, which we have held was not well taken.

Judgment affirmed.

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No. 117.

FRANCOIS DOURS v. JOSEPH CAZENTRE.

1. This Court, as one of appellate jurisdiction, will not take notice *ex officio* of the rules of the inferior court; neither will it receive evidence going to establish the character of such rules.
2. By means of an assignment of errors, only errors of law, patent upon the face of the record can be brought to the notice of this Court.

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3. Courts of record must keep a formal record of all orders and decrees; and where there is no written note of such order and decree, it will be presumed not to exist.
4. Therefore, where there is no formal record of the proceedings pointed out by law for the restoration of a cause to the ordinary from the dead docket, such proceedings will be considered as never having been had.
5. Courts will not readily give a retroactive effect to legislation; but rather hold it applicable alone to the future.
6. Where, however, legislation is not *ex post facto* and does not divest vested rights, impair the obligation of a contract, or otherwise violate the constitution, it may be made retroactive.
7. The Act No. 39 of 1880, approved 23d March, 1880, had such retroactive effect and applied to cases that had been "continued indefinitely, and remained so continued for one year," at the date of its becoming a law.
8. As it has not been shown that this cause was actually withdrawn from the ordinary docket and placed upon the dead one, this Court will not presume that such change was made.
9. The mere presumption that a clerk of the Court has done his duty, is outweighed by the sanctity with which the law clothes a final judgment.
10. It was not the duty of the plaintiff in this case to see that his cause was transferred to the dead docket; nor could he be held to proceedings to reinstate it upon a docket from which it had never been removed.

*Appeal from the Civil District Court, Parish of Orleans,  
Division A. Tissot, Judge.*

A. Voorhies for plaintiff.

R. S. Denée for defendant, appellant.

MCGLOIN, J.—Plaintiff sued and recovered judgment, after issue joined, against defendant for \$335.85, with interest and costs. Defendant was absent and not represented at the time fixed for trial. He appeals to this Court, presenting an assignment of errors raising the following questions:

1. That the suit was instituted and pending before the late Sixth District Court for this parish, and was transferred to the Civil District Court, created under the existing Constitution, without notice, as required by the rules of said Civil District Court.



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2. That the judgment was obtained by illegal practices on the part of appellee, and in violation of Act No. 39 of 1880, inasmuch as, on June 3rd, 1879, the cause was continued indefinitely, and so remained for more than a year, and under said act was assigned to the dead docket, and could not be taken therefrom, to be refiled and tried, except by order of court on written motion, and that it appears from the record that no such motion was made or order obtained, and that the subsequent proceedings, being in violation of a prohibitory law, are null and void.

I.

This case, involving less than five hundred dollars, comes up to us upon questions of law alone.

In the determination of the question, as to what are its facts, we have absolutely nothing to do, under the Constitution. The appellant in this case files his affidavit to the existence of the rule of the Civil District Court, upon which he relies, while counsel for appellant states, that while this provision was contained in a projet for rules of said court, suggested by a committee of the Bar for adoption, and printed, yet, it was, in fact, omitted from the rules, as really adopted and enforced. He files, in support of this assertion, a certificate from the clerk of the Civil District Court.

We do not consider ourselves authorized or called upon to take *ex officio* notice of the rules of the Civil District Court for the parish of Orleans, nor can we receive or consider anything in the nature of evidence going to establish their existence or character, as this Court is one exclusively appellate. *Butler v. DeHart*, 1 Martin La. N. S. 184; *Bowman v. Flowers*, 2 Martin La. N. S. 267; *Denton v. Murdock*, 5 Rob. La. 127; *McAuliffe v. Destrehan*, 9 Rob. La. 466. Had this issue been first presented below, the judge *a quo* might have taken official cognizance of the rules of his court, as we will do of those regulating the proceedings of this tribunal. His certificate, like that establishing any fact proven, admitted or otherwise

legally known to him, might be sufficient to establish before us the existence of such rules, or any portions thereof.

Furthermore, the appellant brings up this appeal exclusively upon assignment of errors. Under Sec. 3, Rule III, of this Court, and in fact under the provisions of the Code of Practice, a party can bring forward in this way, for correction, only such errors as are apparent upon the face of the papers.

The error here complained of is certainly not patent upon the face of the papers, but is discoverable, if it exist at all, only by an examination of the rules of the court *a qua*, which form no part of the transcript.

## II.

We believe, that were the facts and principles of law advanced in this division of appellant's assignment of errors sound and correct, we would be competent to grant relief. The Civil District Court is a court of record, bound under the law to keep proper minutes and due record of all its orders and decrees. In fact, it is only by the observance of the formalities declared by the law that the official actions and declarations of the judge are distinguishable from his non-judicial utterances as a man.

Therefore, where no official record appears in the papers of a suit presented to this Court of any order or decree, and no suggestion is made of a diminution of record, we are bound to consider that it never had any existence whatever, and dispose of the cause with that view. Applying these principles to this case, we are bound to consider that the elaborate proceedings required by the Act of 1880, No. 39, for the restoration of cases from the dead docket to the ordinary one, have not been had in this instance. The record also shows that the cause was continued indefinitely on June 3rd, 1879, before the late Sixth District Court, and so remained for more than one year before its transfer to and trial before the Civil District Court for this parish.

It is true that the Act of 1880, No. 39, was not approved until March 23rd, 1880, long after the continuance of June-

3rd, 1879, and that the cause was transferred and tried in January, 1881, less than one year after the going into effect of the statute. It is also true that the courts will not readily give to legislation a retroactive effect, but rather hold it applicable alone to the future; *Rogers v. Goldthwaite*, 1 McGloin, 127. Yet, where a law is not *ex post facto*, does not impair the obligation of contracts, divest vested rights, or otherwise violate the Constitution, it may be made by express provision, either wholly or partially retroactive in its effects. The language we are to interpret, following provisions requiring the clerk to make and keep a dead docket, and to place cases of another class thereon, is as follows: "He shall likewise assign to said docket all cases that *have been assigned* for trial and *continued* indefinitely, and *remained* so continued for one year." Here, at the *time of the enacting* of this statute, the Legislature carefully employed terms of the past, showing that they had in view the regulation of a state of existent affairs, as well as those which might arise in the future. In face of such language, we cannot circumscribe the evident scope of the law by restricting it exclusively to such cases as might be continued, and remain dormant for a year, all *after* its passage.

We have satisfied ourselves, as shown above, that we must consider the non-existence of the order and proceeding of restitution, provided by the act, as apparent upon the record in this case, and the continuance and dormancy of the suit is likewise so apparent.

Were this case shown to have been actually placed upon the dead docket, we would consider its subsequent fixing and trial, unless acquiesced in by defendant, as being a ground of nullity, patent upon the record, and one of those errors which the law and the rules of this Court contemplate as peculiarly within the province of an assignment of errors.

However, as it is not shown that the cause was ever so placed upon the dead docket, we cannot consider a fact so essential to appellant as established, for it is neither necessary

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or customary for the record to show from what docket in the court below the case was taken. Nor can we reverse a solemn judgment upon the presumption that the clerk has done his duty, a presumption which, if at all admissible to establish a fact of such facile proof, is certainly outweighed by the sanctity with which the law ever clothes a solemn judgment.

Taking it, then, as not established that the case was upon such docket, and treating the cause as though it had not been so placed, we do not consider that plaintiff was under any obligation to institute proceedings to secure its removal from a docket upon which it never appeared, or to reinstate it upon one from which it had never been removed.

The clerk of the lower court may have been remiss in his duty with regard to this case, and may have even incurred the penalty announced in the act, but plaintiff was under no obligation to suggest to him or compel, upon his part, the performance of his duty. On the contrary, it was the duty of the defendant to see that the clerk complied with the law, and that the case was so disposed of, if he desired it to be done, and the court *a qua* had the right to presume from his inaction a waiver or acquiescence upon his part.

However, although it is not made to appear in this record that this case was placed upon the dead docket, or that the rules of the court *a qua* were violated, it may in fact have been disposed of in violation of said law and rules, as contended, in which event defendant may have the right to bring his action for nullity and make his proof, and so introduce to our notice the facts and questions he now seeks to present. We do not wish, by our decree, to preclude him from availing himself of this remedy, if it exists, in his behalf.

It is, therefore, ordered that the judgment appealed from be affirmed, with reservation to appellant of his right to an action of nullity, if any exists, in his favor, he to pay costs of appeal.

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Marionneaux vs. Brugier.

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No. 134.

**EMMA MARIONNEAUX v. FORRESTER BRUGIER.**

1. The plea of prescription may be renounced either expressly or tacitly. La. C. C., Arts. 3460, 3461.
2. Where a party sued files the plea of prescription, as an answer, and subsequently solicits of the Court leave to withdraw the same and present a declinatory exception, which is accorded, and such an exception filed, he thereby renounces the prescription originally plead.
3. The father is liable for damage occasioned by his minor child, residing with him, or placed by him with other persons. La. C. C. 2318.
4. The restriction of La. C. C. 2320, limiting liability for damages occasioned by the acts of minors to 'cases where the person to be charged "might have prevented the act which caused the damage and have not done it," applies only to *masters or employers, teachers or artisans*. The Court refuses to follow *Cleaveland v. Mayo*, 19 La. 414.
5. The discharge of fire-arms in the streets of a city, or in a manner to injure others, constitutes gross negligence.
6. He who sets up contributory negligence as a defense, must establish it.

*Appeal from Division B, Civil District Court, Parish of Orleans.  
Houston, Judge.*

*B. Egan* for plaintiff.

*T. J. Semmes & Payne* and *James J. Legendre* for defendant and appellant.

MCGLOIN, J.—Plaintiff, widow of Ernest Marionneaux, Sr., sues upon the following allegations: That she is the mother of the minor child Ernest Marionneaux, who on January 1st, 1880, was shot in the face by Oscar Brugier, minor son of defendant, with a gun, loaded with powder; that the shooting was reckless and malicious upon the part of said Oscar Brugier, and has caused great suffering and permanent injury to her said son, Ernest Marionneaux, and great suffering anxiety, loss of time and expense to herself in nursing said child and procuring medical treatment, etc., for him. She prays simply for the damages she individually has endured, placing them at one thousand dollars. Defendant first filed *as an answer* the

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plea of prescription of one year. Subsequently he moved the court *a qua* to be permitted to withdraw and discontinue the plea of prescription, and file the plea of *lis pendens*. Having obtained this leave, he filed said plea of *lis pendens*, setting forth that "the obligation, cause of action, and parties herein are the same as those involved in suit No. 970 of the docket of this Court, entitled E. Marionneaux v. F. Brugier still pending and undetermined."

This exception being overruled, he again filed the plea of prescription of one year. The date of the injury was, as has been stated, January 1st, 1880, and the citation in this case was served only January 4th, 1881, more than one year thereafter.

The record contains no note of any evidence offered below upon the trial of said last exception, and the certificate of the clerk is in the usual form; neither does the order of the court *a qua* recite that any evidence was tendered. We are bound to consider that there was no evidence outside of what appears in the record. We are asked, as the citation was served more than one year after the infliction of the injury, and there is no proof of any interruption, to maintain the plea.

This we cannot do, because we consider that the record shows an abandonment of the plea of prescription. It is well settled that the exception of *lis pendens* is declinatory, and that it must be filed in *limine litis*.

Having filed an *answer*, the right to present this declinatory plea was gone. When defendant, in order to obtain the privilege of presenting this declinatory plea, withdrew and discontinued the peremptory one of prescription, we consider that the right to plead prescription was abandoned, and that it would be inequitable and unjust to permit defendant to present it a second time. La. C. C., Art. 3460, authorizes the renunciation of prescription when once acquired. By C. C. Art. 3461, this renunciation may be express or tacit. The last named article declares also that "a tacit renunciation results from a fact which gives a presumption of relinquishment of the right

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acquired by prescription." The course adopted by defendant in filing this plea and then withdrawing it by leave of court to present another, declinatory in its nature, which latter under the circumstances was excluded by the answer he had filed setting up prescription, is certainly a tacit, if indeed it be not an express renunciation.

The evidence shows that Oscar Brugier and other boys were engaged for some time, on New Year's day, near the defendant's house, discharging fire-crackers and fire-arms; that the boy Marionneaux, aged nine years, was attracted to the spot, and formed one of the crowd standing around. Oscar Brugier had a gun, attempting to discharge it, when, after several attempts, it went off, injuring young Marionneaux severely, by flame and powder, in the face and right eye.

It is urged that, as it is not shown that the father was present and could have prevented the act occasioning the injury, that he is not responsible.

La. Civil Code, Art. 2318, is to this effect:

"The father, or after his decease the mother, are responsible for the damage occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. The same responsibility attaches to the tutors of minors."

This law is clear, and imposes responsibility in such cases as this upon the father, *without the limitation or restriction* claimed by defendant. We are not authorized to impose upon this article a modification which is not to be found in the text, expressed or implied.

The case of *Cleaveland v. Mayo*, 19 La. 414, we cannot follow, as, in that case, this question does not seem to have been closely considered, and it is, besides, in contravention to the clear wording of the law. The restriction of C. C. 2320, limiting liability to cases where the person sought to be charged might have prevented the act which caused the damage, forms no part of C. C. 2318. It relates alone to masters and em-

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ployers, teachers and artisans. The modifying clause itself, by clear expression, limits itself to persons of this class. It declares :

"In the *above cases*, responsibility only attaches when the *masters or employers, teachers and artisans*, might have prevented the act which caused the damage and have not done it." The case at 19 La. 414, practically inserts the words, "father and mother" into this clause, where the legislator has omitted it. Doubtless the court in that case were misled by the French authorities, based upon the article of the Code Napoleon, No. 1384, which corresponds to Arts. 2318 and 2320, combined, of our own. The French article, however, does expressly include the father and mother in this saving provision. The fact that the authors of the Louisiana Code have omitted them is pregnant of meaning and strongly expressive of a purpose entirely at war with the decision cited.

It is not proven that Oscar Brugier wilfully injured the boy Marionneaux, nor do we believe that he so did; but we consider that it is carelessness of the grossest character to discharge firearms in the streets of a city, and to discharge them in such a manner as to injure another.

It is urged that there has been contributory negligence on the part of the injured boy. The burden of proving contribution is upon him who sets it up as a defence to an action against himself for reparation of damages his own act has occasioned. A party making this plea must satisfy the court that it is well founded upon the facts.\* It is also principally a question of fact and inference therefrom, coming within the province of the jury. In this case, the jury did not consider that contribution was shown on the part of Ernest Marionneaux, and neither have we been satisfied that any existed.

We do not consider the damages accorded as excessive, or beyond proof.

Judgment affirmed.

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\* See W. B. Raymond in Western Jurist of Dec., 1881.—Reporter.



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*Court of Appeals, First Circuit, Parish of Red River.*

**AUGUST, BERNHEIM & BAUER v. J. C. & J. M. BROWN.\***

1. A *cessio bonorum*, under the insolvent laws of Louisiana, is not a bar to a suit by non-resident creditors, even in a State Court, where such creditors have not participated in the proceedings.
2. Such creditors may urge their suits to personal judgment even before the insolvent proceedings are at an end, provided they do not interfere with the property surrendered.
3. Non-resident creditors, being without the territorial jurisdiction of the courts of this State, cannot be cited in such insolvent proceedings through an attorney for absent creditors.
4. Even such creditors, however, cannot interfere with the distribution of the assets surrendered and the judgments they may obtain, notwithstanding the *cessio bonorum* can be levied only upon property subsequently acquired by the debtor.

*Appeal from the Tenth Judicial District Court, Parish of Red River. Logan, Judge.*

*Montfort S. Jones* for plaintiffs, appellants.

*L. B. Watkins* for defendants.

MONCURE, J.—These cases come before us on appeal from a judgment of the District Court for the parish of Red River, ordering that further proceedings in the suits shall be stayed pending the progress of the insolvent proceedings.

The defendants, under the insolvent laws of this State, have applied to have themselves declared insolvents, and have been, as appears from the evidence, formally discharged, their cessions having been accepted by the judge, a meeting of the creditors called, and the usual order of stay of proceedings against their persons and property entered. The meeting of the creditors has been held and the cession has been accepted by them also.

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\* This case was consolidated for trial with two others, involving the same issues, viz.: *Watkins & Gilland v. J. & C. Brown*, and *M. Dauner & Co. v. same defendants*. The opinion and decree applied to all; but to avoid confusion in citation of the case, the title only of the first of the three has been used.—Reporter.

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The plaintiffs in these suits are all non-residents of the State, and the question to be determined under the rule in these cases is, shall the stay of proceedings ordered by the judge against the persons and property of the insolvents apply to them. We think it should not, even in the courts of this State.

The surrender has been consummated, and nothing now remains to be done but to distribute the property surrendered among the creditors who have accepted the cession, and who are bound by the laws of this State to submit to its results. It might be contended that even those not subject to the authority of our laws could be restrained from proceedings in our own courts which would embarrass these insolvent proceedings until the surrender was perfected and the property of the insolvent placed beyond the reach of such judgments as they might obtain; but we are at a loss to perceive what purpose is to be subserved by a further stay after the property of the insolvents is so disposed of that it may be distributed without the interference of those creditors who are not bound by the cession, and who prefer to obtain judgments rather than participate in the distribution. What is the object of this stay of proceedings? Clearly that all claims against the property to be distributed shall be adjudicated, *in concurso*, by the judge before whom the creditors of the insolvent are cited. All resident creditors may be cited, and are therefore bound by the adjudication. All non-resident creditors may voluntarily come in and participate, and to give them an opportunity to do so, they are cited through an attorney for the absent creditors; but we do not think that the citation through such attorney binds them by the proceedings if they reside beyond the jurisdiction of our courts and are not, by virtue of their residence, or the character of their debts, subject to the authority of our laws. The plaintiffs in these suits surrender their participation in the distribution of the property of the insolvents and claim that they have the right, under the law, to proceed in said suits to obtain judgments, to be executed alone upon the

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future property which may be acquired by the defendants Have they the right, under the law, to do so?

As to them, the question, in the present attitude of the cases, is not whether the cession may be pleaded as a stay to their proceedings, but in actual bar to those proceedings. All that could be accomplished by a stay has been accomplished. To stay proceedings further and indefinitely is to operate as a bar to the judgments they claim the right, under the law, to obtain. We are then met directly by the question whether the surrender and discharge of the defendants may be opposed as a bar to the right of the plaintiffs to put their claims in judgment in the State courts.

The case chiefly relied upon by the defendants to sustain this plea, which we are forced to consider as one in bar, is that in 8 La. An. 318. The most that can be claimed for the decision in that case is, that a contract made in Louisiana, and between parties residing in Louisiana, must be subjected to and controlled by the laws of Louisiana, and that the vested rights of the parties to such a contract could not be divested by the transfer of the contract to a resident of another State. The opinion of Judge Slidell, in his concurring opinion in this case, is succinctly what we have stated was the conclusion of the Court, divested of the prolixity of reasoning by which Judge Ogden arrives at the same conclusion. Besides, even admitting all the reasoning by which the conclusion is reached, we are told by Chief Justice Marshall, in the case of *Ogden vs. Saunders*, that it is a general rule, "that the positive authority of a decision is co-extensive only with the facts on which it is made." But no such state of facts exists in either of the cases we are considering as existed in the case of *The Northern Bank of Kentucky v. Squires*. There is a decision in 10 La. An. 145, which is more recent, in which the Court says: "In his review of the jurisprudence of the United States on this subject, Mr. Chancellor Kent said: 'It will be perceived that the power of the States over this subject is, at all events, exceedingly narrowed and cut down, and as the decisions now

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stand the debt must have been contracted after the passage of the act, and the debt must have been contracted within the State and between citizens of the State, or else a discharge will not extinguish the remedy against the future property of the debtor.''' This opinion of Judge Kent seems to have been adopted by Judge Voorhies as the organ of our own Court.

But the decisions of the Courts of the United States, much later in date than our own, have decided that the mere residence of a creditor beyond the limits of the State puts him beyond the control of our insolvent laws, and that, as we have no power to cite him before our courts, so he is not bound by the discharge of his debtor under our insolvent laws. The case referred to in 1 Wallace, 223, which sustains this view, is a full and complete review of the preceding authorities upon this question, and it loses none of the force of its authority by the fact that the decision is delivered by Judge Clifford, who has always been recognized as exceptionally sound upon the question of the rights of the States and the powers of their courts. In this decision, the doctrine is clearly stated and established that a discharge under the insolvent laws of a State is not a bar to the action of a creditor residing in a different State, who has not proved his debt against the insolvent in the insolvency proceeding, nor in any manner been a party to those proceedings. The authorities, up to the time it was rendered, fully sustain this decision, and there is no decision of the United States Courts since which at all conflicts with it. This also seems to be the current of decisions of the State Courts, and we do not doubt but that the Supreme Court of this State, with the light of the case in 1 Wallace and other recent authorities before it, would put itself in the same current. These United States authorities are later than our own, and we do not feel at liberty to disregard them, upon the strength of an apparent conflict between them and a single case in our own courts, decided some ten years previously.

That the plaintiffs have the right, at some time in the future, to obtain judgments on their claims, even in the State Courts,

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does not seem to be seriously denied by any one ; but when that time is to come, or upon the happening of what events, we are not informed. We think they are clearly entitled to judgments, either in the State Courts or the United States Courts, and we can see no reason why they should not be allowed to obtain them now. Of course, if they proceed on their claims to judgment, they abandon their right to any interest in the cession or distributive share in the property surrendered. They will not be allowed in any wise to disturb the insolvent proceedings, nor must they attempt to execute their judgments, when obtained, against any other than property acquired by the insolvents subsequent to their complete discharge.\*

For the foregoing reasons it is, therefore, ordered and decreed that the judgments appealed from be avoided and reversed, and that these cases be remanded to the District Court to be proceeded with according to law, and that defendants pay the costs of this appeal.

Rehearing refused.

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No. 92.

MR. AND MRS. A. H. BROWN v. D. B. PENN ET ALS.

1. The action against a Recorder of Mortgages, for furnishing a false certificate, arises *ex contractu* and not *ex delicto*.
2. Hence, the prescription of one year does not apply.
3. Where a bill of exceptions is taken to evidence, going to establish a particular fact, and later the fact itself is admitted, this Court will not consider the bill.
4. In an action for the recovery of a community debt, brought in the name of the husband and wife, that of the latter is mere surplusage.
5. One who holds the legal title to an obligation may bring suit upon it for the benefit of another.
6. There is no law prohibiting the placing of a community asset in the name of the wife.

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\*These cases were determined before the rendition by the Supreme Court of its opinion in *Orr & Lindsay v. Lisso & Scheen*, 33 La. An. 476; but the Court of Appeals, of the First Circuit, re-examined the questions involved in the same cases, as upon later appeals, and abided by its original ruling.—Reporter.

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7. A husband may demand, upon a debt due the community, a decree in his wife's favor.
8. A purchaser under defective title, but not negligent, or in bad faith, will be allowed to recover against the Recorder, whose error was the cause of the loss, in addition to the price he has paid, the repairs made upon the property, and expenses incurred in defending his title.
9. It is no defense to such an action against the Recorder, to show that by paying an additional sum, the deceived purchaser might have quieted his title. Such purchaser was under no obligation to make such further disbursement.
10. An exception, or objection, is not waived or destroyed by a subsequent admission of facts going to establish the verity of such objection, or exception.

*Appeal from the Fourth District Court, Parish of Orleans.*

*Houston, Judge.*

*Guy Duplantier* for plaintiff.

*T. H. Kennedy* and *C. L. Walker* for defendants, appellants.

ROGERS, J.—On the 29th of December, 1877, Mrs. Ellen J. Decker, wife of Henry B. Mills, purported, by public act before F. J. Laiser, notary public, to convey to Mrs. Sarah Magdalena Phister, wife of A. H. Brown, certain real estate in this city. As required by law, application was made to D. B. Penn, Register of Conveyances, for the certificate of non-alienation by the vendor, Mills' wife, and the said register furnished a certificate declaring, as provided by law, that it did not appear from the records of the conveyance office; that the said Mrs. Mills had ever alienated the said property. This certificate was untrue; it should have declared that the said Mrs. Mills had, by an act before W. B. Kleinpeter, a notary, dated 29th March, 1876, sold, by a "*vente à réméré*," this identical property to one Mrs. Snowden; that that sale was duly registered in the conveyance office, book 108, folio 367, and that said registry existed on December 29, 1877, when the improper certificate was furnished Laiser, the notary, who executed the act of sale to these plaintiffs. This error is imputed by defendant's counsel to either "the press of business, or inadvertence or ignorance of some deputy clerk."

Under the conditions of the sale to Mrs. Snowden, vendors were granted the right of redemption, i. e., within one year, on the payment of \$220.00; within two years for \$240.06; within three years for \$266.20; within four years for \$292.80, and within five years for \$322.10; so that at the date of the purported sale to these plaintiffs, their vendor, Mrs. Mills, had not lost her right to redeem on payment of a sum of \$266.20.

The price of sale agreed upon between plaintiffs and their vendor was \$450. Three hundred and seventy-five dollars in cash and the balance, seventy-five dollars, to be paid within twelve months, with eight per cent interest, and represented by a promissory note identified with the act of sale.

Almost immediately thereafter plaintiffs took possession of this property and commenced reparations; a few days thereafter Mrs. Snowden notified them of her title by letter, and several notes of an indefinite character were sent in reply by a clerk in the office of the Register of Conveyances; the date of these notes is the 9th; the repairs were begun on the 5th, and about 17th January the plaintiffs moved in. On 9th February following, legal proceedings were instituted by Mrs. Snowden, and in the month of June judgment was rendered in favor of Mrs. Snowden, dispossessing these plaintiffs.

The amount in damages claimed is \$992.13, representing as a total the following items:

1—The purchase price.....	\$450 00
2—The cost of improvements.....	75 00
3—The cost of repairs.....	54 95
4—Insurance .....	7 88
5—Removal to new house.....	8 00
6—Notary's fees.....	10 00
7—Costs incurred in defending title.....	85 80
8—Sheriff's costs.....	20 50
9—Counsel fees.....	50 00
10—Curator <i>ad hoc</i> .....	25 00
11—Copy of act of sale.....	5 00
12—Loss of time, etc., attending court.....	200 00

There was judgment against defendants for the sum of six hundred and ninety-seven dollars and eighteen cents, with legal interest from judicial demand.

The defenses upon which we are called to pass are—

1st. The prescription of one year.

2nd. That there was no plaintiff in court with a cause of action; because there was no capacity shown in the wife to sue, the debt being due to the community of acquets and gains.

3rd. That the damages, if any, must be restricted to the purchase price actually paid or the amount required for the redemption, under the conditions of the act of sale to Mrs. Snowden; and

4th. It is urged on appeal that the judgment *a quo* should be set aside as *ultra petitionem*, being in favor of Brown and his wife, when it should have been as prayed for, in favor of the wife only.

Damages resulting from a failure of official duty, with reference to the specific performance of a particular act required of the officer, and which the law authorizes him to perform, do not arise *ex delicto*; the relations which grow out of the employment and the nature of the service to be performed by an officer charged by law with the duty of preserving evidences of title and certifying truthfully in connection therewith whenever called upon, as required in this case, by a peremptory law, are in the nature of contracts: for a fee imposed by law, the register agrees to certify the facts as they appear of record in his office, whenever legally required to do so.

“Certain obligations are contracted without any agreement.  
\* \* \* \* \* Some are imposed by the sole authority of the laws.” La. Rev. C. C. 2292.

Chief Justice Marshall, in *Ogden vs. Saunders*, 12 Wheat., p. 341, says: “A great mass of human transactions depend upon implied contracts, which are not written, but grow out of the acts of the parties.”

In *Brigham, Curator, v. Bussey*, 26 La. An. 677, a suit against



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the recorder of the parish of Morehouse for a failure in not reinscribing a judgment within the proper time, as specially instructed to do, the court says :

"In our opinion, the action is one *ex contractu* \* \* \* the law made it his duty to reinscribe the judgment when duly called on to do so. \* \* \* We concur in the opinion that Marcadé has 'developed the distinction between damages *ex delicto* and damages *ex contractu* with his usual brevity and felicity ; the former flow from a violation of a general duty, the latter from a breach of a special obligation.' It was the general duty of the recorder to do right—not to discharge the duties of his office in a violent or oppressive manner to obey the precepts of the law ; but it was his special duty, imposed by the law, to reinscribe the judgment in question when required by a party in interest to do so."\* In the instant case it was the special duty of the Register of Conveyance to deliver a correct and truthful certificate to the notary, Laiser, when so requested by him ; made so by two sections of the Revised Statutes, 2528, 2529, which, for a failure on the part of the notary to demand, inflicted on him, simply the servant of the parties, a very heavy penalty.

The plea of prescription of one year was properly overruled.

During the trial in the lower court, Albert H. Brown was sworn as a witness, and defendants objected on the grounds that, as the judgment sought was for his wife, under allegations that she had suffered damages by the unlawful act of defendant, Penn, the husband was not a competent witness in her behalf. The court permitted the witness to show, on suggestion of counsel, that the claim set up was a community claim.. Subsequently, it was admitted by counsel for both

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\* See Cooley on Torts, p. 383 ; Shearman & Redfield on Negligence, § 286 ; Blackstone's Com., Book III [\*164], Thompson on Negligence, vol. 2, pp. 825, 827.

French authorities—Troppong, *Privilèges et Hypothèques*, tome 4, p. 352, on Art. 2197, Code Napoléon ; Loaré, *La Législation Civile*, tome 16, p. 420 ; Laurent on Art. 2197, Code Napoléon ; Paul Pont on same ; Duranton on same ; Bassompierre contre Lemarié, 30 juin, 1810, *Journal du Palais* ; Mariette, c. ref. 2, Dec. 1816.—Reporter.

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parties that the claim set up was one belonging to the community. Under these circumstances the court is not called upon to pass on the objections taken by defendants, the same being waived by their subsequent admission.

At the same time, therefore, of this purchase by Mrs. Brown, there existed between her and her husband a community of acquets and gains, and the fact that the title was executed in her name, did not change that condition; flowing from this condition, undoubtedly the present action against the Register of Conveyances and his sureties is founded upon a claim due the community.

It is for this reason that the court is asked to determine that no cause of action has been shown, and no capacity in the wife to sue, for a wife cannot sue for a debt due the community; and when a wife sues and seeks a judgment on a claim disclosed by the evidence to be a community claim, the suit must be dismissed.

An examination of the petition shows that this is an action addressed to the late Fourth District Court for the parish of Orleans, as the petition of Sarah Magdalena Phister, wife of Albert Henry Brown, *and of the said Albert Henry Brown*, both residing in the city of New Orleans.

This, in connection with the judicial admission that this action is based on a claim due the community, at once determines the petitioner, if any doubt could exist from the language used. The wife is joined with the husband, the head and master of the community. Her name adds nothing to and takes nothing from the quality or importance of the husband's demand.

"It may be disregarded as surplusage." 12 La. An. 383; 29 La. An. 213.

Disregarding, therefore, the use of the name of Mrs. Brown as petitioner, the husband remains seeking a judgment in favor of his wife. There is no law which prohibits the placing the title to community property in the wife's name. La. C. C. 2399, 2400, 2402.

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It is, therefore, difficult to see why a husband, in a suit which he brings to recover a community claim, cannot ask to have it placed in the name of his wife, particularly a monied claim, which, under our law, is a movable, and which, under Art. 2404, he can dispose of by gratuitous title. The fact of placing it in the name of his wife did not affect its community distinction, nor were defendants in any manner injured thereby; it was the exercise of a caprice on the part of the husband, void of injury, and not opposed to law. The husband could certainly dispose of whatever he realizes from this cause to his wife, as he could to a stranger.

In *Rawle*, for the use of, etc, *v. Skipwith*, 19 La. 210, passing upon an exception that the suit should have been brought by *Rawle* for his own use and benefit, the Supreme Court say: "The legal title is in *Rawle*, and he may sue for whom he pleases, in the same manner he might make any disposition he chose of the funds after judgment, if he had sued in his own name."

In interpreting C. P., Art. 15, the same principle is announced—2 La. 265; and the jurisprudence is established by numerous authorities.

In 18 La. An. 484, where a suit was brought by a firm for the use of another and discontinued by the firm, it was held that the party for whose use it was brought passed out of court with the dismissal of the suit, for the reason that the court found that the firm, *Moore & Browder*, had the right to sue; they had control of the suit; dismissing the suit on their own motion left the other party, *Alter*, without legal right or authority to prosecute to judgment for *his own* benefit, because, quoting 19 La. 207, "the practice of suing for the use of another is based upon the ground, that whoever has the legal title and can sue for himself, may sue for the benefit of whom he pleases, in the same manner as he might dispose of the funds after judgment, if he sued in his own name." It must be recollected that in this case the muniment of title stood in the name of the wife. She purchased; she demanded the

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certificate from the defendant; she was sued and against her was the judgment rendered, setting aside her possession, her husband simply appearing, aiding and assisting, or rather permitting proceedings involving community interests, to be conducted by his wife in her own name, and by all of which he has become legally and irrevocably bound; and, yet, at no time was there any other interest involved than that of the community of acquets and gains existing between Brown and his wife. There is no objection to the form of proceeding adopted in this controversy nor to the form of relief prayed for.

It is true that the sale to Mrs. Snowden was a "*vente à réméré*"; that her title was defeasible at the date of plaintiffs' entry, January 17th, by the payment of \$266.20, and while Mrs. Brown, when she discovered the prior sale, might have paid this amount, there is no reason why she should have done so. It is not so clear that Mrs. Brown undertook a hopeless litigation or provoked an unnecessary suit. The reasons and judgment of the court that heard and determined the controversy regarded it as one of great interest; he required that Mrs. Brown should be reimbursed by Mrs. Snowden the sum expended in making additions to the property. We cannot hold that the course pursued was improper or reckless.

We do not consider, however, that the plaintiffs have shown a right to receive more than four hundred and forty-five dollars and thirty cents; this amount, includes the purchase price, costs of sale and the costs of suit to maintain possession, and results after allowing one hundred and twenty dollars, amount received by plaintiffs. The other claims are too remote and consequential in their nature and not properly chargeable as damages resulting from the issuing of the improper certificate, except possibly the item for improvements and repairs; these, however, plaintiff in this case demanded from Mrs. Snowden in the litigation had with her, and the claim was liquidated and allowed her by the judgment.

To allow them again in this cause would be to permit a double recovery of the same sum.

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It is, therefore, ordered that the judgment of the lower court be reduced from six hundred and ninety-seven dollars and eighteen cents to the sum of four hundred and forty-five dollars and thirty cents, with legal interest from judicial demand, and that in other respects it be affirmed. Costs of appeal to be paid by plaintiffs; those of the lower court by defendants.

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ON APPLICATION FOR REHEARING.

MCGLOIN, J.—We are asked to grant a rehearing in this case, on the ground, that the objection urged to the capacity of Mrs. Brown to sue in this case, was one of pleading; that she could not, appearing to enforce pretended rights of a paraphernal character, convert the demand into one for a community claim, said causes of action being distinct and contradictory. Were this really the character of the issues presented, we should have granted a rehearing, as we do not desire to be placed in the attitude of holding that a woman, who distinctly alleges that a certain right is paraphernal in its nature, can, in face of such allegations, show it to be one in community, and recover accordingly.

What we did declare was, that it is competent for the husband to place a community claim in the name of his wife, if he so desires, and to sue for it as such, and have the judgment rendered for her use

The petition in this case is a joint one by husband and wife. It nowhere declares that the debt is the paraphernal property of the latter, and does not even annex, or make the act of purchase, with its declarations, a part of itself.

It is true, that it does not expressly declare that the claim was a community one, but, even if the presumption in this connection, created by law, did not supply this omission, defendant might have forced plaintiffs to be more explicit, and then, had the declaration of separation, and of the paraphernal character of the claim been made, their position would have been maintained by this tribunal.

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Dumas vs. Boulin.

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Appellants complain that this Court held, that the admission by them made in the trial below, that the object of the demand belonged to the community, changed the nature of the cause of action, or waived objection thereto.

Such was not the view of the Court. Had the petition been one upon a claim alleged to be the separate property of the wife, and, in pursuance of an objection, properly made, it had been shown by admissions, or otherwise, that the claim was not the paraphernal property of the wife, but belonged to the community, this would be but establishing the verity of the objection, instead of constituting a waiver thereof. In this case, however, the petition has no such allegation, and the objection that we considered as being waived by the admission, in question, was not one of pleading, but one affecting the competency of the husband to testify.

Rehearing refused.

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No. 122.A. P. DUMAS *v.* WIDOW A. BOULIN.

1. The party demanding a trial by jury is bound not only to make a deposit of the jury fee, but also to keep the same good. Therefore, if the sum so deposited be embezzled, or otherwise lost, it is at his risk.\*
2. The loss of such deposit would not *ipso facto* deprive the litigant who had made it, of his right to a trial by jury. He should have reasonable time and opportunity to recover, or replace the sum lost.
3. If, however, as in this case, after due notice and demand, he neglects, or refuses to replace, or recover such deposit, the effect from the moment of default, is the same as though he had never advanced such jury fee.
4. Definitions of the word "include."
5. In interpreting doubtful portions of a statute, the context must be appealed to, where it furnishes a key.
6. The Act of 1860, p. 130, and its successor, La. C. C., Art. 2924, last paragraph, excluding the defense of usury against certain written obliga-

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\* Under the laws of Louisiana, juries are impanelled in civil causes, only when demanded by one, or both, of the litigants.—Reporter.

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tions, applies only to notes, bonds, etc., which evidence a complete contract, and which include the principal and usurious interest.

7. They do not apply to a note, etc., which has no consideration other than usurious interest upon another contract or obligation.

*Appeal from the Civil District Court, Parish of Orleans, Division C. Monroe, Judge.*

*R. L. Belden* for plaintiff.

*Albert Voorhies* for defendant, appellant.

MCGLOIN, J.—The issues in this case are preserved by bills of exception, and are likewise presented by a statement of facts. The circumstances pertinent to the first question we have investigated, are as follows: The suit was pending before the late Fourth District Court and was transferred, under the Constitution, to the Civil District Court. Defendant had, before the first named tribunal, demanded a jury and made the legal deposit for jury fees. Plaintiff transferred the record and cause, and then ruled the defendant to show cause why the case should not be placed upon the ordinary docket and tried without the intervention of a jury. Plaintiff's contention is, that it was defendant's duty, within a reasonable time, either to transfer or replace the deposit he had made. Defendant maintained that the plaintiff should have demanded the same from the clerk of the former court and placed it in the possession of the clerk of the Civil District Court.

The reason for compelling such a deposit, at the moment of demanding a trial by jury, is to ensure the prompt payment to each jurymen of the compensation allowed him by law, and at the same time to prevent the possibility of such applications being made for or causing delay. If a party could demand such a trial, and secure the transfer of the case to the jury docket, and then refuse to provide the sum necessary to compensate the jurors, there would be left open only one of three alternatives. Either the cause would have to be postponed and then remitted to the ordinary docket, after considerable loss of time; or the jurymen would be compelled to serve with-

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out immediate recompense, awaiting for the paltry fee allowed them by law, until it be collected as other costs; or else the party, who had not desired such manner of trial, would have imposed upon him the obligation of advancing the fund necessary to defray its expense.

The object of the law is, therefore, not simply to arbitrarily tax the claimant, demanding such a trial. It has the broader purpose of imposing upon him the duty of providing for the *immediate payment* of the jurymen, so soon as they shall have disposed of the cause. The provision requiring the deposit is only a method of the law for securing this end; but it does not remove the general obligation itself of accomplishing it from the party upon whom it rests. Therefore, in our opinion, the applicant is not only compelled to make, but he must maintain this deposit, so that the *purpose* of the law be accomplished. Should it be embezzled, or otherwise lost, it is at his risk, as the deposit is only in the nature of a guarantee or security for the performance of a legal obligation, which it does not, in any manner, extinguish or replace.

Should such deposit be lost, the applicant should not thereby, *ipso facto*, lose his right to a jury; but he should, upon ascertaining the loss, have an opportunity of replacing the deposit. If, however, as in this case, after due notice, he neglects or refuses to renew or recover it, the effect, from the moment of default, is the same as though he had never furnished the amount by law required of him. The ruling of the Court, therefore, making absolute the rule in question was correct.

The second bill touches the merits of the cause. The note sued upon, it seems, has for its consideration usurious interest upon another preceding contract. The history of the usury laws of this State is well and elaborately given by Mr. Justice Marr, in his opinion in the case of Chaffe & Son v. Heyner, 31 La. An. 606, 607. We consider it there demonstrated that where a contract of loan is involved the charging of usurious interest in this State forfeits all the interest, and not merely the unlawful excess.



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Dumas vs. Boulton.

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The last paragraph of Art. 2924 C. C. furnishes the law which must determine this case. It has been held in *Crane v. Beatty*, 15 La. An. 329, and *Campbell v. Hilliard*, 15 La. An. 537, that the Act of 1856, p. 130, which was the origin of the second to the last paragraph of C. C., Art. 2924, applies only to cases where notes, or similar paper, were purchased or discounted, and not to those where the person taking the paper was the one who made the loan at usurious interest. It has frequently, also, been held, that the usury laws apply only to contracts of loan. *Byrne v. Grayson*, 15 La. An. 457; 11 La. 493; 15 La. 306; *Bank of La. v. Briscoe*, 3 La. An. 157; *Mills v. Crocker*, 9 La. An. 334.

But the last paragraph of C. C. Art. 2924, which reproduces Act of 1860, p. 41, is much broader than the one immediately preceding it, which is itself preservative of Act of 1856, p. 130. By its provisions "the owner of *any promissory note, bond, or other written evidence of debt*, for the payment of money to order or bearer, or transferable by assignment, shall have the right to collect the whole amount of such promissory note \* \*

\* notwithstanding such promissory note, etc., may include a greater rate of interest, or discount, than eight per cent per annum," etc.

Mr. Justice Marr, in the case cited, says: "It is not necessary to express any opinion now as to what the effect would be, *as between the original contracting parties*, where interest above eight per cent. is included as a part of the capital sum and a note given for the aggregate amount, in the settlement of an ordinary debt."

This case, by subrogation, stands now between the original parties, but, the conclusion reached upon other questions, releases us from the necessity of expressing our opinion upon this point.

The fate of this case turns upon a construction of the word "include," as used in the last paragraph of the article cited. This word has two meanings, or, rather, we might say, two shades of the same meaning. It may apply where that which

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is affected is the *only thing* included, in which sense, it would cover this case. It is also used to express the idea, that the thing in question constitutes a part only of the contents of some other thing. The latter sense we consider the most usual (C. C. 14), but on the other hand, it restricts more the scope of the law. The adoption of the latter would be more in harmony with the general drift of the usury laws, as contained in the Code and Statutes, but, it is possible that the Legislature had in view the assimilation of this branch of the law to that governing promises to pay conventional interest, or the debt of a third person, by making its prohibitions inapplicable when the parties have reduced their agreements to writing. Under these circumstances, the duty of discovering the legislative intent becomes one of difficulty. C. C. Art. 16, requires or permits us, in such cases, to appeal to the context. By so doing we consider that the words "may collect the *whole amount* of such promissory note, etc., notwithstanding such promissory note, etc." \* \* \* taken in connection with the terms, "may include a greater rate of interest, etc.," afford us a guide as to the idea which was in the legislative mind at the time of the enactment of this law. It, in our judgment, clearly implies that the character of writings in view were those which evidenced a complete contract, including principal and interest of its own, and not one, like the present, which, properly speaking, had no capital and included nothing but usurious interest upon another contract. This paragraph creates an exception to the general law upon this subject, and therefore is not to be extended. We are not at liberty to apply it to cases, or circumstances, which we do not believe came within the contemplation of the Legislature when it was enacted.

As, therefore, the law forfeits the whole of the interest, when it is usurious, and as this note has no other consideration but such usurious interest, we believe that it cannot be enforced by courts of justice.

Judgment reversed and now rendered for defendant, with all costs.

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Brooks vs. Dolard.

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*Court of Appeals, Fifth Circuit, Parish of Plaquemines.*

F. C. BROOKS *v.* A. P. DOLARD.

ON APPLICATION FOR REHEARING.

1. Article 103, Constitution of 1879, imposes upon the Courts of Appeals the rules of practice regulating proceedings in the Supreme Court only in so far as the same may be applicable.
2. The delay of three days allowed by the Supreme Court for applications for rehearing in cases outside of the city of New Orleans, is not obligatory upon the Circuit Courts of Appeal.
3. Said Courts of Appeal may adopt rules regulating applications for rehearing before them, and where, under rules so adopted, such applications are to be filed before the end of the term, in any particular parish, and one is presented after adjournment *sine die*, it will be disregarded.

*Appeal from the Twenty-sixth Judicial District, Parish of Plaquemines. Livaudais, Judge.*

*Latige & Livaudais* for plaintiff and appellee.

*Beauregard* for defendants and appellants.

BLAKE, J.—The application for a rehearing in this case was filed with the clerk on the 5th of November, 1880, after the adjournment, *sine die*, of this Court.

The Constitution, in creating Courts of Appeal, limits their sessions in the various parishes composing their respective circuits, and in many (notably that of Plaquemines) to one week.

The framers of our organic law contemplated that within the compass of time limited for each session, the business before the Court should be brought to a finality, hence the restriction contained in article 103 of the Constitution, which provides "that the rules of practice regulating appeals to and proceedings in the Supreme Court, shall apply to appeals and proceedings in the Courts of Appeal, *so far as may be applicable*, until otherwise provided by law.

In the absence of express law regulating the practice before

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the Courts of Appeal, it is clear that owing to the limited session of one week, wherein cases are to be heard and determined, the delay of three days allowed for rehearing by the Supreme Court is inapplicable, as its tendency would be to defeat the intention of the law-makers in securing a speedy determination of cases.

The same remedy, we concede, exists in Courts of Appeal as before the Supreme Court, and in recognizing the right of a party to his application for rehearing, *ex necessitate rei* it must be presented within a period, to be provided for by rules of this Court, adopted in regard to this matter. We have thus provided in Rule 9. The application should have been made at the same term of the Court in order to be disposed of before adjournment *sine die*.

The application for a rehearing, in this instance, comes too late, and is consequently denied.

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No. 124.

ALFORD, BETTIS & CO. v. W. B. HANCOCK & SONS.

1. The object of the laws regulating pleadings is due and fair notice.
2. A plaintiff in order to make proof of any substantial and material fact must allege it.
3. A plaintiff will not be permitted to prove a state of facts different from those upon which he has declared.
4. Where the items of a bill sued upon are set up as the result of direct dealings between plaintiffs and defendants, when the truth is, that plaintiffs hold such claim by assignment, the latter fact cannot be proven.
5. This is a question of pleading, and it is not affected by the fact that plaintiffs are the real owners of the claim, and payment to them would be a full discharge.
6. Where the law is clear and express, the courts have no discretion.
7. This Court will strictly enforce the laws of the State regulating pleadings.

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Alford, Bettis & Co. vs. Hancock & Sons.

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*Appeal from the Civil District Court for the Parish of Orleans,  
Division B. Rightor, Judge.*

*B. F. Forman* for plaintiff.

*J. R. Ferguson, Merrick, Race & Foster*, for defendants,  
appellants.

MCGLOIN, J.—There are two principles of law, or we might say, applications of the same principle, which are fatal to demand of plaintiffs. Code of Practice, article 174, § 4, is to this effect: “The petition must contain a *clear* and concise statement of the object of the demand, as well as of the *nature of the title, or the cause of action* on which it is founded.”

The object of this provision, like all laws regulating pleadings, is to afford due and fair *notice*. When a plaintiff has not set forth a material and principal fact, connected with his demand, and which necessarily should be stated as part of a fair disclosure of his cause of action, he has not complied with the law, and if the defect be not cured by the act or omission of defendant, he should not be permitted to prove it. Therefore, the rule is, that what a plaintiff has not alleged he may not prove.

*Doubere v. Papiu*, 4 Martin La. 186; *Spicer v. Lewis*, 7 Mart. La. 221; *Center v. Torry*, 8 Mart. La. 207; *Giraudet v. Mendi- burn*, 3 Martin La. N. S. 511; *Dumartrait v. DeBlanc*, 5 Mart. La. N. S. 38; *Ponsony v. DeBaillon*, 6 Mart. La. N. S. 243; *Gardère v. Fisk*, 6 Mart. La. N. S. 388; *Benoit v. Hebert*, 1 La. 214; *Hall v. Marshal*, 6 La. 50; *La. State B'k v. Senecal*, 9 La. 226; *Lyons v. Jackson*, 4 Rob. La. 465; *Wells v. St. Dizier*, 9 La. An. 119; *Abat & Generes v. Pennuy*, 19 La. An. 289; *Cald- well & Shannon v. Neill Bros.*, 21 La. An. 342; *Dubuy's v. Far- mer*, 22 La. An. 478. Also, *Alexander v. Slocomb*, etc., 9 La. An. 7; *Dickson v. Emerson*, 9 La. 107; *Delogny v. Smith*, 3 La. 420, *Williams v. Bethany*, 1 La. 319; *Judice's Heirs v. Brent*, 6 Martin La. N. S. 226.

If, still worse, a plaintiff has stated his cause of action dif- ferently from what it actually is, he has violated this law, and

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cannot be permitted to prove a state of facts different from that which he has declared. His adversary is called upon to meet the claim, *as it is presented*, and is supposed to prepare his proof with that view alone. Therefore, the rule is, that the evidence tendered must be to the facts as alleged. In other words, the *allegata* and *probata* must agree.

Victoire v. Moulon, 8 Martin La. 400; Flogny v. Adams, 11 Mart. La. 548; Fisk v. Cannon, 1 Mart. La. N. S. 346; Pritchard v. McKinstry, 12 La. 226; Nichols v. Creditors, 9 Rob. La. 476; Bouche v. Michel, 10 Rob. La. 92; Riley v. Wilcox, 12 Rob. La. 652; Cohn & Bruen v. Levy, 14 La. An. 355; Roberts v. Hyde & Mackie, 15 La. An. 51; Shaw & Zuntz v. Noble, 15 La. An. 305; Hereford v. Lake, 15 La. An. 693; Duplantier v. Michoud, 19 La. An. 530; Drew v. Attakapas Co., 26 La. An. 306; Johnson v. Canal and Claiborne R. R. Co., 27 La. An. 53. See, also, Palfrey's Syndics v. Francis, 8 Martin La. N. S. 264; Priou v. Adams, 5 Mart. La. N. S. 693; Rodriguez v. Morse, 2 Mart. La. N. S. 358; Foster v. Dupre, 5 Mart. La. 13.

In this case, plaintiffs advance their claim as the result of direct and original dealings between themselves and the defendants. The facts are, that a firm of the same name and business of the present plaintiffs, occupied the stables of O. P. Alford, one of the plaintiff firm, until the end of June, 1880, when it dissolved by limitation. The balance due by defendants and another party, to the old firm, were assigned in the settlement to Alford, who seems to have conducted the business for some little time in his own name. Later, he formed a new firm, the one which is now suing, which, though having the same name as the dissolved co-partnership, was differently constituted. Before the institution of this suit two bills, or rather one bill, in two parts, was rendered the defendants. One, in the name of O. P. Alford alone, showed a balance due of \$876.15. The other gave the particulars of subsequent dealings with Alford, Bettis & Co., showing a balance to the credit of defendants of \$137.53. This balance was at the foot of the latter bill, a statement offset, or absorbed "by amount:

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due O. P. Alford, \$876 15," and the remainder, \$738.62, is that which is now sued for. The bill annexed to the petition makes all of this figure under the name alone of Alford, Bettis & Co., and the ones rendered before were brought into court by *sub. pœna duces tecum*, plaintiffs having secured their possession under pretence of copying and then refused to return them. The sum, therefore, due by defendants, if due at all, is a balance upon his transactions with O. P. Alford alone, or with the old firm of which he was the successor. In whatsoever manner the new firm acquired the claim, it was a material and principal fact, the recitation whereof was essential to a "clear and concise statement" of the cause of action. Not having alleged any transfer or assignment of the claim to them, plaintiffs could not prove it.

Furthermore, plaintiffs had alleged that all the items going to make up this unpaid balance had resulted from transactions originally between themselves and the defendants, and they should not be permitted to recover upon a state of facts different from those set up.

We see no merit in plaintiffs' bill of exception going to question the right of defendants to show this variance, upon cross-examination, and to avail themselves of it. They had the right to bring plaintiffs' witnesses down to details, when the latter had dealt with general and sweeping assertions of the correctness of the bill sued upon, and when the real facts were so drawn out, to avail themselves of the variance by proper objections and reservations. To hold differently, would be to enable a plaintiff, by vague or false swearing, to emancipate himself from the requirements of C. P. Art. 174, and defeat the wholesome rules of evidence and pleading to which we have just referred.

Nor does it make any difference, as contended for in a second bill, whether or not the account really belongs to the present plaintiffs, or whether Alford has estopped himself from demanding the indebtedness from defendants, and so removed all danger to them of paying twice. The issue is not one of

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Ziegler vs. Mutual Aid and Benevolent Life Association of Louisiana.

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individual right or particular justice, but of pleading alone. In framing these general laws of pleading, the Legislature had in view the *general good*, and the Courts must uphold them by their application to the particular cases within their scope, without enquiring into peculiar features of each.

Recognizing the necessity of fixed and certain rules in this connection, and the baneful effect of attempting to bend the law to meet the equity of particular cases, whereby an uncertainty is introduced that is harrassing and detrimental to the interests of the general public, this Court shall endeavor to enforce the law as it is written. The great advantage of express legislation is that it relieves the affairs of men from that incertitude and liability to perpetual, and often retroactive, change, which must result, where matters are dependent alone upon the opinions, as to equity, of tribunals whose judges are being constantly changed. When courts, in face of written law, allow themselves a latitude to enforce, deny or modify it at will, to meet the exigencies of particular cases, to say the least, they deprive the people of the principal advantage which they might expect from a code of written laws.

Judgment reversed, and plaintiffs' demand dismissed as in case of nonsuit.

Rehearing refused.

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No. 108.

**CATHARINE ZIEGLER v. MUTUAL AID AND BENEVOLENT LIFE  
INSURANCE ASSOCIATION OF LOUISIANA.**

1. Where an Insurance Company pleads forfeiture of a policy, the burden is upon such company to establish the defense.
2. Where testimony is reduced to writing by questions and answers, the latter are to be construed in connection with the former.

*Appeal from the Sixth District Court for the Parish of Orleans.*  
*Rightor, Judge.*

*Chas. Louque, for plaintiff, appellant.*

*H. N. Ogden, for defendant.*



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Ziegler vs. Mutual Aid and Benevolent Life Association of Louisiana.

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ROGERS, J.—This is an action on two policies of life insurance issued to Charles Ziegler for the benefit of his wife, plaintiff herein.

The policies are known as class A and class B. Policy A contains the following clause :

“ Said Charles Ziegler hereby agrees to pay into the treasury one 25-100 dollars upon the death of any member of the association, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in English, and one in French, for five consecutive days.” Provided \* \* “ That if the party hereby assured fails to pay the assessment called for above, upon the decease of a member, within the time mentioned, *and fails to give good and acceptable reasons* therefor within twenty days thereafter, \*  
\* then, in every such case this policy shall become null.”

The answer admits the issuance of the policies, but denies liability, for the reason that the policy A lapsed and was forfeited by the non-payment of assessments Nos. 214, 215 and 216, published December 7th, 1875.

The burden of proof was upon the defendant, to establish the forfeiture; they have shown that the publications were made, as required, on December 7th; but the plaintiff has shown that on December 30th the deceased made his payment, and no published calls were made after this date.

No forfeiture was ever entered upon the books of the company prior to Ziegler's death. The treasurer testifies : “ We generally leave the account open on the books for reinstatement; we are privileged by our charter to reinstate parties when they come in good health, but in this instance, he necessarily never appeared—having died he couldn't appear.”

The testimony has not satisfied us that the Company should prevail in their defense.

One of the conditions of policy “ B ” is that the insured “ agrees to make a deposit of twelve dollars (two assessments), and renew the same when said deposit has been consumed, within thirty days from date of written notice, deposited in the

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Broussard vs. Babin, Guidry & Co.

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postoffice, in the city of New Orleans, State of Louisiana, addressed in conformity with his written address, filed with the secretary of the Association."

The testimony of the secretary and treasurer establishes that notices were sent through the postoffice, according to the terms of the charter. This evidence was adduced in answer to questions having reference to the deposit by the secretary of the notice under terms of the agreement in this policy, and construing these answers in connection with the questions, as should be done, the defense is sufficiently established.

The judgment is reversed, and judgment is now rendered in favor of plaintiff against the defendant, for five hundred and ten dollars, amount of policy "A," and legal interest from March 30, 1874, with costs of both courts.

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*Court of Appeals, Third Circuit, Parish of St. Martin.*

FELIX BROUSSARD v. BABIN, GUIDRY & CO.

1. The failure to mention the amount of the judgment appealed from, or to insert the words "devolutive appeal" in a bond furnished for such an appeal, is not fatal.
2. Judicial bonds will be construed by reference to the law or laws, and the order of court, if any, under which they are given.
3. In a suit against an ordinary partnership, whereof the members are bound jointly for its debts, if the whole claim be in amount sufficient, each partner may appeal, although his portion of the obligation be less than the amount necessary to give this Court jurisdiction.
4. Where prescription has been plead for the first time before the Appellate Court, and the plaintiff asks for the remanding of the case to establish an interruption, it will be done.

*Appeal from the Twenty-first Judicial District Court, Parish of St. Martin. Fontelieu, Judge.*

*F. Voorhies* for plaintiff.

*C. H. Mouton* for defendant and appellant.

ON MOTION TO DISMISS.

MOORE, J.—Plaintiff sues defendants, a planting partnership, for \$499.00, with interest, for advances and necessary

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supplies, for their plantation, to enable them to carry on their planting operations.

Only one of the defendants, Emile Babin, made an appearance in court and filed, in answer to the suit, a general denial, and also denied specially, that he had ever authorized the partnership, or any member thereof, to purchase goods, obtain advances or supplies, or to make any assumption of payment, so as to bind him personally. A judgment by default was taken against the other defendant. The court *a qua* rendered a final judgment jointly against the defendants for the amount sued on.

From this judgment Babin alone has taken a devolutive appeal. Two motions to dismiss the appeal have been filed in this court, on the following grounds: 1st. That the bond of appeal is invalid in form and illegal, for the reason that it has never been approved and accepted by the clerk. 2d. The amount of the judgment is not mentioned in the bond, and the amount fixed by the court, and required either for a devolutive or suspensive appeal, is not set forth in the bond. 3d. No mention is made in the bond either of a suspensive or devolutive appeal; the bond merely showing that the appellant has prayed for a (blank) without specifying what. The other motion to dismiss was made on the ground that this Court is without jurisdiction "*ratione materiae*," the judgment appealed from being joint, and each partner being liable thereunder for one-third of the whole debt, which is less than \$200.00.

We will take up the motions in their order.

That made on the ground of defectiveness of the bond. It is in proof that the bond was accepted, approved and filed by the clerk.

It is not necessary to the validity of an appeal bond of this kind that the amount of the judgment appealed from should be mentioned in the bond.

The amount fixed by the judge of the court below, in his order granting the appeal, viz., \$50.00, is set forth in the bond. The third ground set forth in this motion we also decree insufficient.

The defendant, as it appears from an extract from the minutes of the court, moved in open court for a devolutive appeal. This was on the day the judgment was rendered and signed. The order of appeal was granted in open court and entered on the minutes. In this order the title of the suit is given; the nature thereof is stated and the amount of the bond is fixed. The appeal was from the judgment mentioned in the order and in the motion for an appeal. There can be no difficulty in identifying the bond with the suit and the judgment; payment thereof could not be successfully resisted by the signers thereof on the ground mentioned in the motion to dismiss.

The bond is a judicial bond, and it is a well established principle of law, in this State, that judicial bonds should be construed by reference to the law in pursuance of which they were given. 15 La. An. 68; 29 La. An. 527.

It has been held by the Supreme Court that any clause which is superadded in such a bond must be rejected, and any clause that is omitted must be supplied. 16 La. 174, 196; 3 La. An. 663; 12 La. An. 63.

We consider the bond given in this case sufficient, and such a one as the law and the order of the judge contemplated, and as could be recovered in a suit against the makers thereof.

We do not consider the ground upon which is based the motion to dismiss, *ratione matariæ*, tenable. The suit is for \$499, with interest. It was brought against the members of a partnership, all residing in the same jurisdiction. It is true that the partnership is an ordinary one, and that the members thereof were only jointly liable; but the partnership was a legal entity, and was chargeable with the debt, and the entire property thereof was responsible for its payment. The plaintiff had a right to unite all the members of the partnership as defendants, in one and the same suit. His action was for a sum of money exceeding the amount necessary to give jurisdiction to this Court. 24 La. An. 442; 25 La. An. 291, 325. The motions to dismiss are overruled.

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Pitard vs. Carey.

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## ON THE MERITS.

MOORE, J.—The plea of prescription has been, for the first time in this suit, filed in this Court in behalf of defendant.

The plaintiff has had no opportunity of showing an interruption of prescription, and at the suggestion of plaintiff's counsel, we will remand this case to the court *a qua*, to be again tried, in order that plaintiff may have an opportunity of showing an interruption of prescription.

It is, therefore, ordered, adjudged and decreed that as far as the defendant Babin is concerned, the judgment of the court *a qua* be avoided and annulled; and it is further ordered, that this case be remanded to the District Court of the Twenty-first Judicial District, in order that further proceedings therein may be had, in accordance with law and the views expressed herein. It is further ordered that plaintiff pay the costs of appeal.

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No. 148.

## GUSTAVE PITARD v. THOS. D. CAREY.

1. This Court cannot disturb a judgment, as between appellees.
2. Where the State, or a representative thereof, has been proceeded against and condemned below, but has abstained from appealing, this Court is without power to disturb the judgment against it, even though it be the Sovereign.
3. Where the State, or any representative thereof, has been garnisheed, the debtor has no right, in his own interest, to raise the question of the Sovereign's exemption from judicial pursuit.
4. It is primarily the province of the Legislature to regulate matters of public policy, and where it has undertaken so to do, the courts must enforce its will.
5. Where the matter of exemptions is regulated by law, the courts are without discretion either to extend or restrict.
6. The rule is that the property of a debtor is the common pledge of all his creditors, and exemptions, being in the nature of exceptions to the general law, will be strictly construed.

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7. One who does work on a public building, under a contract, is not an officer, as contemplated by La. C. C., Art. 1992, nor is the compensation due him *salary*, as contemplated by the same.
8. The sum due such a contractor is, therefore, not exempt from seizure.
9. The term "salary of an office," as used in La. C. C. 1992, etc., applies only to compensation due public officials or employees, for personal service, and payable at fixed rates by the month or year.

*Appeal from Civil District Court. Houston, Judge.*

*W. E. Murphy and F. D. Seghers* for plaintiff.

*Geo. L. Bright and F. L. Richardson* for defendant, appellant.

MCGLOIN, J.—Plaintiff, a judgment creditor of defendant, garnisheed "The Commissioners for the repairs of the State House at Baton Rouge, La." The garnishees excepted, and with reservation answered. The exception sets forth that said commission is but the agent of the State, superintending the distribution of its moneys, and that proceedings against it, intended to reach said fund, are in fact proceedings against the State; (*Mechanics' and Traders' Bank v. Hodge*, 3 Rob. La. 373); which last, as the sovereign, cannot be made to appear before its own courts. The answer shows that defendant Carey, held a contract for glazing upon the State House at Baton Rouge, and has completed his work satisfactorily, and that a balance is still due him of \$207.84.

Upon the trial below, the garnishee has made no appearance, and from the judgment against it, condemning it to pay to the plaintiff the sum held for defendant, it has taken no appeal. The only appellant is Thos. D. Carey, the judgment debtor.

We are asked by said appellant to pass upon the issues raised by the exceptions of the garnishee, it being contended that, in cases such as this, courts should, *ex propria motu*, notice the fact that the sovereign is sought to be brought before them, and of their own accord refuse to pass in judgment upon its rights.

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Pitard vs. Carey.

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Such a consideration might possibly have been urged with propriety upon the judge *a quo* in the effort to prevent the rendition of the decree he has caused to be made; but that judge is not under our control, except under the circumstances pointed out by the Constitution. There may be error in his findings; but if such findings be not in a case *appealable* and *appealed* to this Court, it would be usurpation upon our part to attempt to disturb them.

In view of the fact that garnishee has not chosen to bring this matter before us, but stands towards plaintiff as a co-appellee, and that we are without the power to alter the decree as between appellees, we do not see how we are to interfere. If, in this particular, there is error, it must be remedied, if at all, in some other manner, for the constitution, by its definition of our powers, has not authorized us, at this time and under existing circumstances, to consider it.

We do not think the defendant is interested to present this question upon his own appeal. The sovereignty of the State rests in the whole people and not in any particular individual. The right by which, possibly, in his struggle before the lower court, he might have called to the attention of the judge the fact that the sovereign was being proceeded against without its consent, was one which might be exercised by any citizen as well as himself. And if, for reason of public policy or of official duty, the judge *a quo* had considered himself, of his own motion, compelled to arrest the machinery of justice in this particular case, it would have been for no reason personal to appellant.

Defendant also contends that, as his labor and service was given to the State, public policy requires that the result thereof should be shielded from seizure under execution; and that the same reasoning which justifies the exemption of the salaries of public officers should protect him.

It is certain that, primarily, it is the province of the Legislative department to determine all questions of public policy. The right of the courts to create exemptions, where the express

law has not done so, is, in any case, exceedingly questionable. But, where the law-maker has specially concerned himself with these matters, exempting some things and not others, the Judiciary is bound to respect his will, and refrain from either adding to or subtracting from the lists as he has made them.

La. C. C., Arts. 3182 and 3183, make the property of the debtor the pledge of all his creditors, and bind the debtor to fulfill his engagements "out of his property, movable and immovable, present and future."

We look to various other provisions of law, creating exceptions to this general rule, and if we do not find a particular kind of property expressly mentioned in such exception, we must apply the general law and hold it for the lawful debts of the owner.

The arguments which may be advanced in favor of freeing an employee of the government from the danger, etc., of having his salary seized for debt, have not escaped the legislator. On the contrary, we find included among the express exemptions, "salaries of office" (C. P. 647), and "money due for the salary of an office." C. C. 1992, and Act 17 of 1874, p. 53.

This, of course, applies to salaries due public officials or employees for personal services, payable at fixed rates by the month, or year. *Conrey v. Copland*, 4 La. An. 307; *Vance v. Lafferanderie*, 4 Rob. La. 340.

It certainly cannot be made applicable to one who, like defendant, holds no *office* and receives no *salary*, but who has contracted to do work and furnish material upon a public building by the job.

Now, as the law, having dealt with this matter, has not included a case like the present within its provisions, we cannot extend it, for, "*inclusio unius est exclusio alterius*."

The judgment appealed from, so far as the same is subject to our review, is correct, and it is affirmed with costs.



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Marshall vs. Sims, Billups & Co.

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No. 129.

BENJAMIN F. MARSHALL *v.* SIMS, BILLUPS & Co.

ON MERITS.

*For Syllabus, see page 223.*

N. B. This opinion should have appeared with that, in the same case, upon the motion to dismiss (see page 223), but, by an oversight, it was omitted.

*Appeal from Division D, Civil District Court, Parish of Orleans.  
Rightor, Judge.*

*Cotton & Levy* for plaintiff.

*Hudson & Fearn* for defendants, appellants.

MCGLOIN, J.—Plaintiff sues for one thousand dollars, as compensation for services in handling and managing cotton consigned to defendants, commission merchants, which services were rendered under the following contract:

“MOBILE, Ala., April 26th, 1879.

It is understood and agreed between ourselves and Mr. B. F. Marshall, that he shall do all he can to control consignments of cotton from responsible persons to our firm in New Orleans, for which he shall receive compensation at the rate of (50) fifty cents per bale. We to furnish the funds to manage the business he may control; and further, he is to devote his best energies and capacity in our office in New Orleans, especially to the management and handling of all consignments of cotton, for which they are to allow him a compensation to be agreed on hereafter. He is to pay his expenses of all kinds.

This contract to be in full force and effect till 1st June, 1880.

(Signed)

SIMS, BILLUPS & Co.”

The answer admits the execution of the contract sued upon, but avers that the respondents were misled by untruthful representations of plaintiff, and by such misrepresentations induced to make this agreement; and that the false statements in question were that he would secure for defendants consignments of cotton, amounting to 7000 bales, whereas he only brought them 1814

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bales. They also set up that they did, during the period in question, a very limited business, reaching in all only 6154 bales of cotton; that plaintiff failed to travel in the rural districts, to solicit consignments, as he had promised to do, when endeavoring to induce defendants to enter into the contract; that he interfered with their business, and was an annoyance instead of a benefit, his pretended services being worth no more than what had been paid him, at the rate agreed upon, for the 1814 bales which he secured, making \$907.00. It is further declared that of the consignments secured, one fell short of reimbursing advances thereon, in the sum of \$361.05, and another in the sum of \$2534 03, and that plaintiff was to secure consignments only from responsible parties, and therefore should return the fifty cents a bale paid him upon these two consignments, amounting in all to \$206.50, for which judgment is demanded in reconviction.

This contract is a simple one, according to plaintiff the right to fifty cents per bale upon all the cotton he procured to be shipped to defendants, and a further sum, to be agreed upon, for services in the management and control of all cottons consigned to them. If the contract was secured by fraudulent misrepresentations, or was entered into by defendants under an error of fact, material in its nature, the resultant nullity necessarily affected the *whole contract*. The defendants' remedy, upon discovering the fraud, or mistake, was to repudiate the agreement entirely and refuse to act farther thereunder. This, however, they are not attempting, in this case, to do. They expressly declare that they abide by the same so far as the fifty cents per bale is concerned, except as to the particular consignments which they claim did not come from responsible parties. It is well settled that parties cannot demand the partial rescission of a contract, and that by approving a portion of a vicious contract, they approve the whole.

So, also, when persons, after discovering the vice of an agreement they have made, partially comply therewith, they waive objections to the whole, for, so soon as they ascertain

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the vice, they have only an election, to refuse entirely further execution of the contract, or to disregard the objection and demand the enforcement of their agreement. They cannot preserve such portions of the same as they desire and destroy the remainder. He who, under such circumstances, chooses to enjoy the advantages of a convention must bear its burdens; and without the enforcement of the principles above laid down men might reap all the privileges of such agreements and deprive their opponents of every compensating advantage.

In this case, after knowing that plaintiff had not secured 7000 bales of cotton, as it is claimed that he had promised to do, defendants settled with him at fifty cents per bale upon what he did influence and retained him in their cotton room, managing their consignments. By this conduct and the pleadings resultant therefrom, they have waived their objections and estopped themselves from setting up the same.

The objection that plaintiff interfered with, or injured their business, shares the same fate, for if he in fact so did, defendants could have discharged him, and having failed so to do, they cannot deny him compensation for the services which he rendered, and which defendants, by knowingly retaining him, are estopped from declaring to have been worthless.

So, also, the objection that plaintiff refused to travel for defendants, soliciting consignments. If he ought to have done so, under his agreement, defendants could have insisted upon his compliance therewith, and, if he refused, they might have discharged him. So long as they did not so insist, and did not discharge him, by acquiescence they are estopped from maintaining that the contract was violated.

Reaching, in this manner, a conclusion upon these questions, we have not considered it necessary to determine whether or not, having failed to insert in this written contract a stipulation binding plaintiff to procure 7000 bales, on consignment, defendants can be heard contending that this was a material fact, or element of the agreement; or whether its proof tended to vary the same. The evidence satisfied the judge *a quo* that

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Weiller & Ellis vs. Blanks et al.

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the sum claimed was a fair compensation for the services sued for, and we approve of his finding.

As to the demand in reconvention, the contract does not bind plaintiff as surety for the consignors whose cotton defendants received. Neither does it appear that defendants surrendered their own judgment or discretion entirely to plaintiff. On the contrary, the evidence shows that they did pass in judgment upon transactions of their agent, before accepting them, or advancing their money. If by too long a retention of these consignments, without sale, the costs, charges, interest, etc., added to the original advance, exceeded the ultimate value or proceeds of the cotton, this consequence is chargeable as much to the defendants as to their agent, the plaintiff herein, for they might at any time have exercised their right of control and ordered a sale.

Judgment affirmed.

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No. 130.

WEILLER & ELLIS *v.* J. W. BLANKS *et al.*

1. A judgment of revival, does not validate or otherwise alter the nature or effect of the original judgment
2. The fact that a plaintiff has appealed from a judgment in his favor, not entirely satisfactory to him, does not prevent him from suing for its revival.
3. Such a proceeding for revival will not prejudice his rights on appeal.
4. Judgments for money are prescribed by ten years from the date of their rendition.
5. The prescription in such case runs from the date of the rendition by the inferior court and not from that of its confirmation by the appellate tribunal.
6. The date of such "rendition" by the inferior court, is that of the signing of the judgment by the judge thereof.
7. The pendency of an appeal, even suspensive, does not stay the course of prescription against a judgment, no matter whether plaintiff or defendant be appellant.

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Weiller & Ellis vs. Blanks et al.

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*Appeal from the Civil District Court, Division D. Rightor,  
Judge.*

*D. C. & L. L. Labatt* for plaintiffs and appellants.

*Singleton & Browne* for defendants.

ROGERS, J.—The late Fourth District Court for the parish of Orleans rendered judgment in favor of plaintiffs against defendants. Plaintiffs appealed to the Supreme Court for the reasons, as shown by their motion of appeal, that Peterson & Hill, who had intervened, had been, in the same judgment, decreed the owners of certain property, which plaintiffs had sequestered and upon which they claimed a lien and privilege. In 1873 the Supreme Court affirmed the judgment against Blanks & Co., who had taken no appeal, and set aside the judgment which had decreed Peterson & Hill the owners of the property sequestered. In March, 1870, plaintiffs issued execution against Blanks & Co. without realizing. In 1881 a *pluries fi. fa.* was issued and the seizure made thereunder arrested by the defendants, on the ground that the judgment was prescribed by the lapse of ten years since its rendition.

It is contended, before us, by the able counsel for plaintiffs, that the judgment of 1869, was set aside and annulled by that of the Supreme Court in 1873, which was the final judgment in the case; that the plaintiffs who had obtained the judgment in the court *a qua* were not satisfied and had suspensively appealed.

We can see no distinction in the application of the rule as to whether plaintiff or defendant takes the appeal—with more reason could it be urged when the defendant takes the suspensive appeal, because plaintiff is thereby prevented from executing his judgment. This is best illustrated by the facts of this case. Plaintiff notwithstanding his appeal sought to make the judgment out of Blanks—he had this right, because Blanks & Co. had not appealed. They were satisfied with the judgment against them, and the only issue still undetermined and on appeal, was as to the ownership of certain property upon which plaintiffs claimed, and, as it subsequently proved, were entitled

to a lien and privilege. But plaintiffs to realize their judgment were not limited to this particular property, their lien was only an additional security for the payment of their claim, they still had a final judgment against Blanks & Co., by virtue of which, at any time, they might have delivered into the custody of the law any property subject to seizure, and if there was a doubt on this point, plaintiffs have furnished an interpretation by an execution issued at their own instance, in 1870. It is not necessary to determine that because they issued their execution in 1870 they abandoned their appeal—it is really not a question to be urged by Blanks & Co. now, who seek a decree declaring the judgment against them extinguished by reason of the prescription of ten years. We have entered upon the discussion of the views just enunciated, as the counsel for appellants have labored with much fervor in oral and printed argument to show that the error of our brother of the District Court resulted from a misconception of certain authorities, which we think are totally inapplicable to the case, because one who is pursuing his rights in court cannot be said to be sleeping on his rights, which axiom is the excuse for this mode (prescription) of extinguishing obligations.

In our opinion, however, the judge *a quo* was correct. 1st. It is immaterial whether the appeal is at the instance of the plaintiff or defendant. If a plaintiff has obtained a judgment, though it may not be all he desired, and he is seeking on appeal to improve it, he can revive it before the expiration of ten years, and he would not thereby prejudice his rights. The judgment of revival “in no respect validates the original judgment, or corrects any defect in it if such exists.” It does not impart to it any additional force or effect, but simply keeps it alive, preserves its validity and prevents its extinction by the lapse of time.” *Marbury v. Pace*, 30 La. An. 1331.

2dly. Under the Acts of 1853, p. 250, “judgments for money shall be prescribed by the lapse of ten years from the *rendition* of said judgment.” The Supreme Court has determined that this statute is clear and free from ambiguity, and that tribunal

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Laviosa vs. Chicago, St. Louis and New Orleans Railroad Co.

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has decided that the terms do not apply to the *rendition of the judgment by the Supreme Court*, because the statute says it "shall be prescribed by the lapse of ten years from the *rendition* thereof, unless revived before they are prescribed by having *citation issued from the court which rendered them.*" *Arrow-smith v. Durel*, 21 La. An. 296. "The rendition of the judgment is the signing thereof by the judge." *Walker v. Succession of Hays*, 23 La. An. 177.

3rdly. "Prescription is a creature of positive law. The law is mandatory and courts are bound to obey it." *Yale v. Randle*, 23 La. An. 580.

"So far from the pendency of an appeal from the original judgment being a good reason why proceedings should not be taken to revive it, the want of such proceedings will enable the judgment debtor to plead its extinguishment by prescription, for it is now settled doctrine that whether an appeal from the original judgment be devolutive or suspensive, its pendency does not dispense the plaintiff who obtained it from instituting his action for its revival and citing the defendant to answer thereto." *Marbury v. Pace*, 30 La. An. 1331.

We are not called upon to determine the rights of plaintiffs as to the intervenors Peterson & Hill. We are dealing with the judgment rendered against Blanks & Co, who, with the plaintiffs, are the only parties before us.

Judgment affirmed.

Rehearing refused.

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No. 52.

CARLOS LAVIOSA v. CHICAGO, ST. LOUIS AND NEW ORLEANS  
RAILROAD COMPANY.

1. The courts will not take notice, *ex propria motu*, of municipal legislation; ordinances, etc., of municipal governments must be established by proof.
2. Where, by law, certain restrictions are placed upon the construction of awnings, sheds or other works, there is an implied authorization to erect such structures, provided the prohibitions of the law be respected.

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Laviosa vs. Chicago, St. Louis and New Orleans Railroad Co.

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3. Without general legislation, denouncing all of its special class or character as nuisances, the municipal authorities of a city cannot declare any particular thing to be a nuisance and abate it as such.
4. The fact that a shed, or structure is erected by one citizen, in violation of a city ordinance, does not authorize another, of his own motion, to demolish it.
5. The fact that the authorities of a city government sanction and assist at the perpetration of an unlawful act, such as the tearing down of an awning, does not exonerate from liability those at whose instance and solicitation the illegal act was done.
6. While a citizen cannot prevent the application of the streets and banquettes, by lawful authority, to the use of a railroad company for right of way, etc., he may insist that such banquettes or streets be used in the manner calculated to inflict the least injury.
7. Municipal ordinances must be reasonable and not arbitrary or oppressive, otherwise they are void.
8. The courts, although they will exercise it with extreme caution and reluctance, have the power to annul municipal legislation, when the latter is in its nature unreasonable or oppressive.
9. Therefore, a railroad company may be prevented from making an unreasonable or oppressive use of a street or banquet, despite municipal legislation expressly authorizing such particular manner of use.
10. Where a plaintiff demands double relief, and this Court finds it necessary to remand for further evidence upon one issue, but is satisfied upon the other, it is not necessary to remand as to both.

*Appeal from the Fifth District Court, Parish of Orleans.*

*Rogers, Judge.*

*Bentinck Egan* for plaintiff, appellant.

*L. E. Simonds* for defendant.

The opinion was delivered by Thomas Gilmore, Esq., member of the bar, judge *ad hoc*, vice Rogers, judge, recused, having decided the case below.

GILMORE, judge *ad hoc*. This is a suit to recover four hundred dollars, as damages, for the alleged wrongful act of the defendant in tearing down an awning erected by plaintiff in front of his house on Euphrosine street, and also to remove the track of the defendant to a greater distance from the plaintiff's house, it being alleged that the track, as at present located,



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*Lavieca vs. Chicago, St. Louis and New Orleans Railroad Co.*

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interferes with the use and enjoyment by plaintiff of his property. There was judgment for the defendant in the lower court and plaintiff appealed.

It is suggested on the part of the defence, that the Supreme Court, to which the case was returnable, was without jurisdiction, by reason of amount, and that as no bill of exceptions appeared in the record, this Court cannot pass upon this case. Const., Art. 129.

The ruling in *State ex rel. Darcy v. Parle*, 25 La. An. 64, appears to be in point, and sustains the jurisdiction.

The question of the right of the defendant, under its contract with or license from the city to use Euphrosine and Magnolia streets for its track, does not properly arise; for, granting the right of the defendant to the use of those streets, still the question remains, whether the defendant, as owner of the adjoining lot, has the right to use its property in such a way as to be a cause of injury and disturbance to its neighbor, and whether it is liable for the injury and damage thereby caused, and the injury and damage caused by the demolition of the awning. Whether the plaintiff had permission from the city of New Orleans to erect the awning, or whether it was erected in violation of a city ordinance, in no manner justified the act of the defendant in tearing it down; and the countenance which it appears to have had from an employee of the city, in so doing, cannot excuse the act or exonerate it from liability.

The evidence establishes that the track of the defendant across its lots were in dangerous proximity to the plaintiff's house, and that the defendant is thus using its property in a way to injure its neighbors, the plaintiff.

The latter has been damaged, in consequence, by the reduced rental value of his property and by the tearing down of the awning erected by him. For this he is entitled to recover. But the pleadings and evidence in the cause do not enable the court to determine what further relief the plaintiff should have.

It is, therefore, ordered, adjudged and decreed that the judg-

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ment appealed from be reversed and annulled ; and proceeding to render such judgment as should have been rendered by the District Court, it is further ordered, adjudged and decreed that plaintiff recover of defendant the sum of one hundred and twenty-five dollars, with legal interest from judicial demand until paid ; and that in other respects the cause be remanded to the Civil District Court for the parish of Orleans for such further proceedings as may be necessary to effect the removal of the defendant's track to a reasonable distance from plaintiff's property, defendant to pay costs of both courts.

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ON APPLICATION FOR A REHEARING.

MCGLOIN, J.—A rehearing is demanded in this case with much earnestness. Several grounds are set forth, and supported by able argument.

It is alleged that the railroad company is not chargeable with the destruction of plaintiff's shed, which was the act of the city of New Orleans, said shed being by it rightfully demolished, as erected in violation of municipal laws. Ordinance No. 30, Leovy's Digest, p. 76, Arts. 72 to 76, are referred to. We find nothing in this ordinance which renders the erection of an awning without the City's assent illegal. What it does is to expressly forbid and to punish by fine the erection of signs or awnings, hanging or extending at a height of less than eight feet from the level of the pavement, or footway. The implication of this ordination is the very reverse of defendant's contention. If it be affirmatively made unlawful to build awnings in one particular manner, it follows that the erection of them is not wrongful *per se*, and that, if otherwise constructed, they are not harmful.

We cannot notice the later ordinance, No. 3065, inasmuch as it was not offered in evidence, and the Court cannot, of its own motion, take cognizance of municipal legislation ; *City of New Orleans v. Labatt*, 33 La. An. 107. If, however, we did take

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notice thereof, it would not help the defendant, for we see nothing therein justifying the arbitrary destruction of awnings, without notice, by subordinate officers of the city. It is not shown, nor does it appear, that awnings, such as the one torn down, are nuisances *per se*. Neither is there any legislation, State or municipal, which make them such. It has been held that, without general legislation, declaring a particular class or character of objects to be a nuisance, the government of a city cannot declare a particular thing to be a nuisance and abate it as such. *Yates v. Milwaukee*, 10 Wall. 497; *First Municipality v. Blinneau*, 3 La. An. 688; *Kennedy v. Phelps*, 10 La. An. 229; *De Ben v. Girard*, 4 La. An. 30.

If, therefore, this power did not belong to the Mayor and Administrators, in council assembled, we are at a loss to know how a mere subordinate of the municipal government could assume to exercise it.

The demolition of this awning was therefore unlawful, and the defendant company solicited it and furnished all the labor necessary to accomplish it. The mere fact that it obtained the sanction of a particular municipal officer and the presence of one of the city's employes, did not make the defendant less an actor in the wrong, and, as such, liable under the law for the damage done, which was, in this case, the value of the awning. La. C. C. 2315, 2324, 2823.

The evidence shows that the defendant, some years ago, curved its track upon its own land, without passing as close as it now does to the house of the plaintiff. It shows that the sleepers extend over the gutters, and are embedded in the banquette in front of the plaintiff's property, filling up said gutter; that the trains in passing lap over the banquette, prevent the erection of a shed or awning in front, shake the house of and otherwise grievously incommode the plaintiff. Were it a matter of absolute necessity that these injuries and inconveniences should be imposed upon him in order that this railroad might have a right of way, there might be here a case of

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*damnum absque injuria*, and the authorities cited would be applicable.

We believe, however, that, while a citizen cannot prevent the application of the public streets to uses such as that to which defendant seeks to apply the one in question, he may insist that such uses shall be so regulated that, while the reasonable convenience of the railway company is consulted, the least possible damage and injury shall be imposed upon himself. He might prevent the defendant from so running that its trains would just graze his doorway, or from constructing their track in such a manner as to render the passage of the streets unnecessarily dangerous to himself, or his vehicle, or to convert his property into a pond or swamp. To hold otherwise is to push this doctrine of the right of way much too far, and entirely beyond the reason of its existence.

Even if the city of New Orleans had authorized the defendant to thus unnecessarily annoy and injure the plaintiff, he would not be without his remedy.

It is now settled beyond recall, that municipal ordinances must be reasonable. Dillon on Municipal Corporations, Ed. 1881, sections 319, 328. They must not be arbitrary and oppressive. Ibid. section 320.

So is it firmly established that the courts, although they exercise the power with extreme caution and reluctance, have the right to annul municipal legislation which is, in its nature unreasonable and oppressive. Same authorities.

The fact that defendant had long used this portion of the track, curving further away from the property of plaintiff, satisfies us that the injury and damage being inflicted upon plaintiff is in no manner a matter of necessity, and we believe that he has the right to insist that the track shall be moved further out; and, as we have no data wherewith to determine how far the removal should be, we are compelled either to nonsuit plaintiff upon this point or to remand. We believe the latter course is the better, under the circumstances, avoiding, as it does, expense and delay.

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The damages accorded we do not consider excessive, and we know of no reason why we should not set this portion of the case at rest, while we remand as to the balance. Defendant, in its application for a rehearing complains of this, but its counsel cites no authorities to support his position, and we see no reason for receding from what has been done.

Rehearing is, therefore, refused.

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No. 118.

SOUTHWESTERN FURNITURE CO. v. JAMES A. MANNING.

1. In cases of attachment, the property of the debtor can be reached only by actual seizure, or by proceedings in garnishment. McGloin, Judge, assents to the decree under the precedents, but questions the soundness of the authorities followed. 32 La. An. 594; 9 La. An. 311, 524.

*Appeal from the Civil District Court, Division D. Rightor, Judge.*

*J. H. Ferguson* for plaintiff and appellant.

*Jas. Timony* and *Jno. B. Kunz* for defendants.

ROGERS, J.—This cause seems to have been tried in the District Court, without reference to the contingency of appeal, but it is admitted by counsel that an affidavit was filed in the court *a qua* that the fund to be distributed, the subject-matter of contest, exceeded two hundred dollars, and was less than one thousand dollars; the District Judge considered the plaintiff was entitled to an appeal. Under the circumstances, we consider that this court has jurisdiction.

The question for decision is, did plaintiff make a valid seizure, by process of attachment in the hands of the constable, under the conditions set forth in the evidence, as follows :

Southwestern Furniture Co.	}	New Orleans, Sep. 30, 1880.
vs. } No. 469.		State of Louisiana.
Jas. A. Manning.		Civil Sheriff's Office, parish of Orleans.

To Roger Murphy, Constable, First City Court:

Please to take notice, that by virtue of a writ of attachment

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Southwestern Furniture Co. vs. Manning.

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issued in the above mentioned suit, I have seized a certain lot of furniture, in your possession, belonging to defendant.

[Signed]

WM. J. GRADY, D'y Sheriff.

This notice was served on the constable, through his deputy, in person. No one was cited in garnishment.

C. P. Art. 256 requires the sheriff, in executing the writ of attachment "*to seize and detain the property of the debtor, whether it consists of goods, effects, rights credits or rights of action.*" If they cannot be laid hold of, because they are in the hands of a third person, who cannot or will not deliver them, the only mode of procedure is to cite such person as a garnishee. *Without an actual seizure or a citation in garnishment, there can be no attachment.* Such is the jurisprudence of this State. 9 La. An. 525, and authorities there cited, and 32 La. An. 596.

The judge *a quo* held, correctly, that the seizure made under the writ by the notice served upon the constable could confer no real right.

Judgment affirmed.

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MCGLOIN, J.—As my colleague is disposed to follow, in this case, the precedent set in *McDonald v. Insurance Co.*, 32 La. An. 594; *Nelson & Co. v. Simpson*, 9 La. An. 311, and *Woodworth v. Lemmerman*, 9 La. An. 524, I am unwilling to dissent, but deem it a duty to declare that the doctrine of those cases has not my acquiescence.

A distinction is drawn by 32 La. An. 594, between seizures under writs of *feri facias* and those under writs of attachment. As to the former, garnishment process is declared to be, as a means of reaching incorporeal rights, merely cumulative; whereas it is held, as to the latter, to be exclusive. In justification of this distinction, reference is made to the brief of counsel for the plaintiff in *Rightor v. Slidell*, 9 La. An. 602. This able brief, to me, is conclusive upon the question, *that in all cases*, under the textual provisions of the Code of Practice,

where such rights are to be seized, they may be reached without the intervention of garnishment process. In *Rightor v. Slidell*, it so happened that plaintiff's writ was one of *feri facias*. It also occurred that the same bench, before which he found himself, had just decided *Nelson & Co. v. Simpson and Woodworth v. Lemmerman*, in which cases they decided this issue adversely to him, in connection with this writ of attachment. He, therefore, out of an abundance of caution, sought to draw a distinction, in this regard, between the two writs, which has, however, not been convincing to me.

It is needless to repeat what he has done so ably, in showing the force and limitations of preceding authorities. All that is here necessary is to give the particular reasons which have led me to the conclusion which I have reached. The Court, in *Rightor v. Slidell*, bases its opinion upon C. P. Arts. 642 and 647. The former declares the writ of *feri facias* to be a mandate to the sheriff to seize property, real or personal, *rights or credits* of the debtor, etc. The latter is to the effect that, "where the debtor has neither movable or immovable property, the sheriff *may seize the rights and credits* which belong to him (the debtor), and all sums of money which may be due to him, in whatsoever right, unless it be for alimony, or salaries of office." It was held that these articles fully justified the seizure of incorporeal rights, which, by their nature, could not be taken into actual custody; and that Act of March 30th, 1839, Section 13, produced no change in these articles, and hence awarded only a cumulative remedy.

Touching the writ of attachment, the legislation is almost identical with these articles, to which reference has just been made. C. P. Art. 239, declares "an attachment *in the hands of third persons*," to be, "a mandate which a creditor obtains from a competent judge, commanding the seizure of any property, *credit or right*, belonging to the debtor, *in whatever hands they may be found*, etc." There is, surely, no material difference, in the scope of this writ, as thus defined, and that of the writ of *feri facias*, as described in C. P. Art. 642.

Article 241, C. P., is to this effect: "A creditor may, in like manner, *obtain a mandate of seizure* against *all species of property* belonging to his debtor, real or personal, *whether it consists of credits or rights of action*, and whether such property be in the debtor's possession, *or in that of a third person*, etc." This is, in its terms, even more sweeping than C. P. Art. 647, for that would seem, in cases of execution, to limit the right of seizing such property to cases where there is no movable or immovable to be reached.

The latter part of C. P. Art. 246 which, as to writs of *feri facias*, stands in the place of Act of 1839, Sec. 13, is to the effect that "a judgment creditor, believing that a third person has in his possession property of the debtor, *may* cause such person to be cited to answer under oath, etc." This is the language which has been held as not modifying the provisions of Arts. 642 and 647 C. P.

But the first part of Art. 246, C. P., applicable to writs of garnishment under attachment, is to precisely the same effect. It declares: "If a creditor know or suspect that a third person has in his possession property belonging to the debtor, or that he is indebted to such debtor, he *may make* such a person a party to the suit, by having him cited, etc." I see nothing in this provision, any more than in the other, of a restrictive character. Strike it out, and under the other provisions cited, rights and credits could be reached as fully under the one writ as under the other. If so, Art. 246, C. P., leaves the option as completely in one case as in the other. If it was intended by this provision to destroy or impair the force of articles 239 and 241 C. P. any more than that of C. P. 642 and 647, the term which should have been employed would be *must* or *shall* instead of *may*. Nor can I see why the same or similar premises should in one case lead to one conclusion and in another to a contrary one.

It will be noted that the Court, in *Rightor v. Slidell*, abstains from any recognition of this distinction, and it was determined later than *Nelson & Co. v. Simpson*, and *Woodworth v. Lem-*



merman. Nor does the later authority of *Safford v. Maxwell*, 23 La. An. 342, give express sanction to this distinction.

It is true, that C. P. 256 directs the sheriff to "*seize and detain*" property reached by this writ, but it must not be interpreted so as to strike all force from other provisions of law, of equal dignity, authorizing him to seize *rights and credits*. On the contrary, it must be so construed as to harmonize with and allow them the fullest effect. When, therefore, it speaks of seizure and detention, it means such seizure and detention as the property affected is susceptible of; actual where possible, and constructive when not. Indeed, in case of conflict between C. P. Art. 256, upon one hand, and articles 239 and 241, the latter should, in this particular, prevail. This would be for the reason that the latter had for their especial object a definition of the writ and what could be reached thereby, and so, as to this was in the nature of special legislation.

But a conflict cannot be brought about by the courts. It must, in fact, stand stubbornly in the way, leaving no reasonable method of avoiding it. Such is not the case in this instance. On the contrary, after using this language it goes into details, as follows: "*Whether it consist of goods, effects, rights credits or rights of action, etc.*" Here is an express repudiation of the idea that because property is not corporeal, it may not, therefore, be seized and detained by the sheriff, and this article would, without other warrant, justify constructive seizures of incorporeal things which, by their nature, are subject to none of a different character.

In this case, the furniture of defendant was already *in custodia legis*. With the possession of the constable the sheriff could not interfere. The only method open to plaintiff in this case, whose writ the latter held, to reach it, was by garnishment, or by constructive seizure, as in the case of rights and credits, not susceptible of actual seizure. I think, individually, that he had a right of choice between the two.

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Wood, John Dennet, Subrogated, vs. Howard et al.

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No. 89.

BENJAMIN WOOD, JOHN DENNET, Subrogated, v. C. T.  
HOWARD *et al.*

1. Where, in the course of any suit, an order is granted taxing the fee of a curator *ad hoc*, held :—  
By Rogers, Judge: The question of appellate jurisdiction is determined by the amount of the decree in favor of the curator :—  
By McGloin, Judge: Such order is but an incident of the main suit, and as such reviewable only by the Court having appellate jurisdiction over such main controversy.
2. Where this Court is not agreed on the question of jurisdiction, the appeal will stand.
3. Any judicial determination arrived at without notice and an opportunity to parties opposed in interest of being heard, is null and void.
4. In the absence of general consent, courts cannot receive unsworn statements, in lieu of formal proof; and a decree based upon such unsworn statements, will be set aside.

*Appeal from the Sixth District Court, Parish of Orleans.*  
*Rightor, Judge.*

*Bayne & Renshaw* for plaintiff, appellant.

*A. A. Grandpré* and *F. Michinard* for curator *ad hoc*.

ON QUESTION OF JURISDICTION.

MCGLOIN, J.—The principal controversy in this case, involves an amount far exceeding one thousand dollars. A. A. Grandpré, Esq., was appointed curator *ad hoc*, to represent some of the defendants who were absentees; filed his answer and the case upon its merits, is still pending. On November 19, 1880, the curator presented a motion, "suggesting to the Court that the case has been compromised between the parties," and obtained an order fixing his fee at \$600, and taxing it as costs. This motion was entirely *ex parte*, and supported by no evidence whatever.

I do not think that we have the right to review this proceeding. It is not an independant litigation, but an incident, to the one between plaintiff and defendant. The judge *a quo*

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Wood, John Dennet, Subrogated, vs. Howard et al.

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takes cognizance of such issues, without separate petition and citation, and determines the same, by reason of the pendency of the original suit. The jurisdiction of district courts of this parish does not extend below one hundred dollars, yet, it would not be contended that, had the curator demanded less than that sum, the Court could not have granted him relief.

Fees of curators are similar, as to their relation to the principal cause, to those of commissioners taking depositions, or of experts, auditors and arbitrators, etc., or even costs of sheriffs and clerks. These, the judge disposing of the case, in connection with which the services are rendered, although the aggregate be far less than one hundred dollars, is required by C. P. 462, 552, and other provisions of our law, to fix or tax, which can only be justified upon the principle, that the question of jurisdiction is determined by the amount involved in the main cause, to which, such orders are but incidents. 10 Martin, La. 115; 11 Martin, La. 577; 4 Robinson, La. 87. In this latter case, *State ex rel. v. Judge*, 4 Rob. La. 87, the Court expressly declares that the fee of a curator, is in the nature of costs in the case.

Our Supreme Court has time and again, reviewed either on appeal or by the remedial writs known to the old constitution, the action of inferior judges, in the disposition of these questions, in cases where the amount claimed as due the officer of the Court was less than five hundred dollars, and some of these cases, as in 30 La. An. 1026, *State ex rel. v. Judge Sixth District Court*, were, where the officer was a curator *ad hoc*.

Indeed, in the authority reported in 4 Rob. La. 85, the Court expressly declares that the question of appeal, so far as an order fixing the fee of a curator is concerned, would have been determined by the amount of the claim, upon which executory process had issued, but for the fact, that the curator had waited until that matter was completely closed, and was at an end as a suit, and his proceeding should be considered as independent in its nature. The case was not referred to us by any

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order of the Supreme Court, but the record was brought into this Court and filed by appellant, under the impression, that the case fell under our jurisdiction by operation of law. I believe that we are without such jurisdiction, and that the case is improperly upon our docket.

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ROGERS, J.—The only question before us is the validity of judgment ordering the payment of the fee to the curator *ad hoc*—while it is an incident of the main suit—it is in fact distinct from any of the conditions upon which the plaintiff in the main action may recover, or the defendant succeed in his defence. Unless this Court can review an order which may become executory by the lapse of time before the original controversy could be even heard, a party aggrieved by a judgment would be without remedy. I think this Court has jurisdiction

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ON THE MERITS.

MCGLOIN, J. The suit, bearing the title and number above given, was to have plaintiff declared entitled to a certain interest in the franchises and property of the Louisiana Lottery Company, for partition and account. A. A. Grandpré, Esq., attorney-at-law, was appointed by the Court curator *ad hoc* to represent non-resident defendants.

On November 19, 1878, said curator presented to the Court *a qua* a motion, suggesting that the case had been compromised between the parties, to tax a fee, in his behalf, as curator. On said motion, and without notice to parties interested, or evidence of any kind, the Court did order a fee of six hundred dollars to be so taxed. Plaintiff appealed to the Honorable Supreme Court, and has transferred the record to this. The organ of this Court in the rendition of its decree in this case, for reasons, which he has filed and placed on record, is individually of the opinion, that it is without jurisdiction in the matter, *ratione materiæ*; but, as the Court is not agreed upon this question, the case cannot be stricken from its docket. Proceeding, therefore, to determine the controversy, we are of

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Dreyfus vs. Lincoln.

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opinion, that the judgment or order appealed from is clearly erroneous.

It is a fundamental principle, that parties are not to be condemned without due notice, and proper opportunity of being heard in their defence. Courts can administer justice, only by receiving the proof of both sides, and hearing what each has to present. Any judicial determination, arrived at, in violation of these rules, is absolutely null and void, as in contravention of the organic law. These principles have been applied by our courts. State of Louisiana *ex rel.* vs. Judge, 30 La. Ann. 1026; Fletcher vs. Henly, 13 La. Ann. 150.

The order in question should be rescinded for another reason. It is recited, that this decree was granted *upon a suggestion* that the case was compromised, which was a fact forming no part of the record history of the case. Courts of justice are not authorized, except by consent of parties, to receive such suggestions, or unsworn statements, in lieu of the regular and formal proof known to the law. If the fact of this alleged compromise was material, it should have been brought to the notice of the Court, in a formal manner, by proper evidence.

Order rescinded and motion denied, with costs of both courts, against mover.

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No. 123.

EMILE DREYFUS v. JEREMIAH LINCOLN.

1. This Court will not disturb the verdict and judgment of a lower court, unless they be clearly erroneous.
2. When a verdict has been arrived at, by means other than conviction of judgment, on the part of the jury, this if proven, might furnish just cause for remanding.
3. Circumstantial evidence can supply the place of direct proof, only when it points plainly to a particular conclusion, and when it can be reasonably explained only upon such particular theory.
4. The mere fact that the jury has allowed plaintiff less than the evidence shows him entitled to, if his theory of the case be adopted, does not establish the fact that the verdict was a compromise one.

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Dreyfus vs. Lincoln.

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*Appeal from the Civil District Court. Houston, Judge.*

*Mott & Kelly* for plaintiff.

*L. E. Simonds* and *J. O. Nixon, Jr.*, for appellants.

ROGERS, J.—The defendant appeals from a judgment against him for the sum of three hundred dollars. The case was tried by a jury and the District Judge after argument refused a motion for a new trial. The questions presented by a most voluminous record are principally questions of fact. After an examination we find the testimony conflicting and many facts testified to irrelevant. We are not prepared to say that the judgment is erroneous. This Court will not disturb the verdict of a jury when the testimony is conflicting and where the verdict was confirmed by the judge who was asked to grant a new trial, unless the judgment is manifestly erroneous.

Judgment affirmed.

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ON APPLICATION FOR REHEARING.

MCGLOIN, J.—It is contended, on application for rehearing, that the Court seems to have accorded too much weight to the verdict of the jury and the approval thereof by the judge *a quo*; and that the true rule is that the appellate court will refuse to disturb the finding below, only where the testimony is so conflicting, that it is impossible, or very difficult for it to determine the cause.

This we do not consider a correct statement of the principle in question. In determining close questions of fact, the jury, or judge *a quo*, have a great advantage over the appellate judges. The former see and hear the witnesses, can note their manner, and form by actual observation an opinion as to the candor and disinterestedness of each. The latter, however, must pass upon testimony *as it is* written, where all peculiarities of manner, conduct, etc., are lost, and where the testimony of one witness usually appears as valuable as that of another.

The Supreme Court has, therefore, always given *great weight* to verdicts and judgments upon matters of fact coming from

below; and have refused to disturb them, unless "*clearly wrong*." Hennen's La. Dig. vol. 1, *verbo* Appeal IX (b), No. 1, p. 92.

It is also claimed that the plaintiff's testimony established an indebtedness as prayed for, if it established any at all; and that it was a question of indebtedness for all or none; that the jury gave a verdict for about one-half of the sum demanded, thereby proving either that it was a compromise verdict, or that the jury considered that there had been negligence or fault on both sides and the loss should be divided equally.

Were it proven that all, or any of the jury had come to a conclusion by any process, other than a conviction of the judgment, there might be force in the position of defendant. So, were it made to appear that the jury found, or believed as a fact that there was fault on both sides, we might possibly remand. We cannot however presume these things. There must be either direct proof, or circumstantial evidence strong enough to satisfy this Court. It is evident, however, that circumstantial evidence is entitled to weight as direct testimony only when it points to one particular conclusion, and cannot be reasonably explained except upon such particular theory.

The jury in its action in this connection may have been actuated by motives other than those assigned it by counsel. They may have believed defendant liable for the full amount, but considered themselves entitled to be lenient towards him. They may have considered themselves authorized to assess the damage in this case, according to their ideas of the real loss, and outside the testimony. Either of the last hypotheses, imply no more against the jury's comprehension of its duties, than do those advanced by defendant, and, if they be the actual ones, it is for plaintiff, and not for the defendant to complain.

Under the circumstances, we do not consider that our first opinion and decree were erroneous, and a rehearing is refused.

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Carroll vs Wallace.

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No. 91.

## DANIEL R. CARROLL v. DAVID WALLACE.

1. In matters of garnishment, the jurisdiction of this Court is not determined by the amount admitted in the answer of garnishee, but, by that which, under plaintiff's writ, is sought to be collected from him.
2. Where a garnishee answers interrogatories without reservation, he cannot complain that he was not apprised of the true amount claimed, or that the notice to him was otherwise deficient.
3. The garnishee, in his answers, must disclose all that is necessary to inform the plaintiff as to what he is entitled to, and to enable the Court to determine fully the question of right in or to the property disclosed, if any. Where such disclosure is made, the answers are sufficient.
4. The plaintiff, in an attachment, cannot proceed against the garnishee to have him condemned until there has been final judgment against the original debtor.
5. McGloin, judge, in assenting to the proposition last announced, follows the precedents, but presents reasons for doubting their correctness.

*Appeal from the Third District Court, Parish of Orleans.*  
*Monroe, Judge.*

*F. R. King* for plaintiff and appellant.

*Hudson & Fearn* for garnishee.

ROGERS, J.—This is a suit commenced by attachment against defendant, a non-resident. G. W. Sentell was made garnishee by service of citation and interrogatories, and to interrogatory 1st: "Have you any property, money, rights, credits or effects in your possession or under your control belonging to the defendant, David Wallace?"

He answers "that he does not know that he has any property, money, rights, credits or effects in his possession or under his control belonging to the defendant, David Wallace, unless it should be so construed that said defendant, David Wallace, has an interest in the net proceeds of eleven bales of cotton, shipped to him by Paul Daniels, of the parish of Point Coupee, La., for account of Wallace & Co., which cotton was sold, and



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the net proceeds thereof, to wit: four hundred and twenty-six <sup>11</sup>/<sub>100</sub> dollars (\$426.21) are held by him for account of Wallace & Co., or for account of Mrs. David Wallace, having been informed that she, Mrs. David Wallace, is the owner of the lands leased to the said Paul Daniels. Besides, he has a letter from Wallace & Co., in liquidation *per pro*. John Wallace, under date of October 17, 1879, after being notified of the shipment of the eleven bales of cotton, instructing him to sell the said cotton for account of the said Mrs. David Wallace, and at the same time calling his attention to the fact that the lands leased to the said Paul Daniels, and the lease are the property of said Mrs. David Wallace."

The other interrogatories and answers are of no moment in the consideration of the questions presented to us.

It is suggested by counsel for appellee, that this appeal should be dismissed *ex propria motu*, the answer of garnishee disclosing an amount of \$426.21 at issue, and the record certifying the judgment of the Court *a qua* was rendered and final prior to August 1, 1880. The general proposition here asserted has been determined by us in *Williams v. Huger*, and repeatedly affirmed, but the application of the views therein expressed cannot be made to the present case. The petition of plaintiff asks for a judgment against defendant, Wallace, for \$811.55; and while the record does not disclose that a copy of the petition was served on garnishee, he was served with the interrogatories and duly cited to answer—he did answer without any reservation of rights, and we cannot hold that he was not sufficiently apprised of the amount of plaintiff's demand, or was not satisfied with the information contained in the citation and interrogatories delivered;—further, we are now considering a proceeding, under the provisions of our Code of Practice, whereby a judgment is sought declaring that Sentell, garnishee, has sufficient property and funds in his hands to satisfy the claim and writ of plaintiff in the sum of \$811.55, the sum in controversy, and consequently within our jurisdiction, and we are urged to so

decree, because he, Sentell, has not answered clearly and directly whether or not he held funds belonging to Wallace.

We have held and will hold garnishees to a strict obedience to the laws, and will not hesitate to liberally apply the sanction of the law to those whose answers are manifestly evasive; but in this case we do not consider the answers evasive, but very clear and explicit. A test would be to assume an answer to this interrogatory first, categorically "no;" while it might be true that garnishee did not owe David Wallace, it would be insufficient and possibly evasive, because, as the facts now present themselves, he would not have answered fully, in order that the plaintiff might have the information to which he was entitled from the nature of his question, and the Court enabled, if requested, to determine the question of right in or to the property; and the same difficulty would result from the answer "yes"—because the garnishee would then have at once assumed to dispose of a right, real or imaginary, of Mrs. Wallace, and in a suit against him by her, he could not allege want of notice of her claim and interest.

This matter has been considered by us on a motion to dismiss appeal, and we then refused to sustain the motion, because the record disclosed that the parties to the suit had tried the rule against the garnishee on the merits, and the judgment was rendered after such trial. (McGloin's Rep., p. 9).

We are satisfied from the answers of the garnishee, that he was not guilty of duplicity.

From the conclusion now reached, it has not been considered necessary to discuss the facts established on the trial of the rule traversing the answers of the garnishee, and for the further reason that no judgment has been rendered against the defendant, Wallace.

"The garnishee is only responsible to the plaintiff in attachment, through the claim which he has enforced to judgment against the defendant in the cause." *Caldwell v. Townsend*, 5 Martin, La. N. S. 308.

Judgment affirmed.

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Carroll vs. Wallace.

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MCGLOIN, J., concurring in the judgment:

The nature of the rule and proceeding now before us upon the merits, is explained in the opinion of this Court, in this case, rendered on motion to dismiss. 1 McGloin, 9.

The answers of the garnishee, are fair, full and explicit, but the merits having been investigated, I consider it shown that the garnishee has property subject to the plaintiff's writ. Objection is, however, made to condemning the garnishee, at this stage of the proceeding, and *Caldwell v. Townsend*, 5 Martin, La. N. S. 308; *Proseus v. Mason*, 12 La. An. 16; *Lynch v. Burk*, 10 Rob. La. 138; *Collins & Leake v. Friend*, 21 La. An. 7; *Lawrence & Co. v. Hermance*, of Supreme Court, not yet reported, are relied upon.

In *Rogers v. Goldtwait*, 1 McGloin, 127, this Court held, that it would endeavor to observe the jurisprudence of the State, as established by the Supreme Court.

In *Forstall v. Hollingsworth*, lately decided by this Court, we also declared, that we would leave radical changes in our jurisprudence, to be inaugurated by the highest tribunal of the State. Therefore, I concur in the ruling of my learned colleague in this case, but only upon the strength of the precedents referred to. I do not, however, consider them as expounding correctly the law upon these questions. They practically maintain that a garnishee has, until the time of rendition of judgment against the principal debtor, to file his answers to interrogatories, and that, until such judgment, nothing can be done to fix his liability. This is, in my judgment, judicial legislation of the worst type, for it does not simply supply legislative omissions, but it actually supplants the legislative will, with that of the judiciary. There is express law, regulating and determining these questions in the Code of Practice, especially articles 260, 261, 262, 263, 264. Article 261 requires the answers to be given "within the usual delay," and Art. 251, declares this delay to be that given in ordinary suits." Art. 263, C. P. declares that the refusal or neglect of a garnishee to answer, shall be "considered as a confes-

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sion, etc." Thus, the law explicitly fixes a certain result, which is absolutely to follow upon the default of a garnishee. Viewed either as a penalty, or as the conferrence of a right upon an attaching creditor, it is, nevertheless, determined by the law itself, and the courts are without discretion to disregard or waive it, or delay its imposition.

In *Proseus v. Mason*, 12 La. 16, the case is likened to those, where a certain act, which is to be done within a particular time, has been permitted to be performed, after the expiration of the delay, where in the meantime, no action of court or party has intervened to prevent it. 7 La. 345; 9 La. 48; 9 La. 58. The parallel does not exist, for the cases to which this principle applies, are those only, where the law does not impose any penalty, or define a result, which is absolutely, and of itself, to follow the default. Thus, where a defendant fails to answer, or a creditor fails to oppose an account, a judgment of default in one case, or of homologation in the other, do not, by virtue of the law, follow as matters of course. On the contrary, in the one case the plaintiff must *move* for his default (C. P. 311), and in the other, the Court must *grant* authorization to pay, after the delay, and this of course, only upon due and proper showing. In neither case, can the Court, even *ex officio*, and unsolicited, enter its orders. We held, in *Somers v. Cabinet Maker's Union*, No. 59, on the docket of this Court, in interpreting the words "taken for confessed," as used in C. P. 349, and applied to interrogatories on facts and articles, propounded to an original party to a suit, that the confession was the result of the law itself, entirely independent of any action by the Court. Such has been the ruling of the Supreme Court in this connection. *Seaman, Beck & Co. v. Babbington*, 11 La. An. 173; *Magee v. Dunbar*, 10 La. 551; *Cox v. Mitchell*, 7 La. 522; *Polo & Tivilier v. Natili*, 14 La. 260.

In my judgment, this is the principle properly applicable to the question now before us.

The spirit and letter of the Code contemplate the speedy determination of the controversy between the plaintiff and the

garnishee, independent of, and I may say before the conclusion of the suit between plaintiff and defendant. The remedy of garnishment was originally accorded in cases of attachments alone, and was extended to writs of *fiери facias* by the amendment to the Code. Therefore, the articles which formed part of the original legislation, had in view suits by attachment, where the writ issues before judgment, and usually gives way to other rights and writs, after the same. C. P. Art. 247 accords the creditor the right to compel the garnishee, admitting the possession of funds to give bond, or deposit the money in Court. Although the word *bail* is used in this article, it evidently means "bond," or security, such as it is permitted to a defendant to give by article 259, C. P. This is evidently to secure the money, pending the litigation against the defendant proper. So C. P. Art. 264, referring to the trial of traverses speaks of the trial and judgment, in connection with the attachment levied against the property in his hands. The decree is expressly required to be *contingent upon the future judgment against the defendant, and to meet the same*. Article 263 would, at first sight, seem to justify the immediate and unconditional judgment against a garnishee, who fails to answer within the legal delay. It, however, does not so expressly say, and we might well consider, that the judgment, which it does not expressly describe, as to its character, or time of rendition was intended to be in these respects, similar to that described in the succeeding article.

At all events, article 263 is far from militating against the position assumed that the law does not make the one judgment depend as to date of rendition upon the other. Nor do I consider it a hardship upon a garnishee, to be required to answer before the defendant is compelled so to do, or before defendant is condemned, as seems to have been discovered in *Proseus v. Mason*, 12 La. 16. On the contrary, it too often happens, that the writ of attachment is expected to reach no property but what may be in the hands of a garnishee, and if he holds none, there is no reason for pursuing the suit. Fre-

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quently, the very question of jurisdiction itself depends upon this issue. The real hardship, and the one which, in my judgment, the law intended to avoid, lies in compelling an attaching creditor, to remain, without advantage to any one, in utter ignorance as to his standing and rights, while he incurs heavy costs, in prosecuting a suit, only, perchance, to find in the end, that the court entertaining the same is without jurisdiction, or that the litigation has been fruitless, by reason of the failure of his writ to reach the property.

The court in *Proseus v. Mason*, recognizes this difficulty, but does not meet it in a manner satisfactory to me.

It does not follow from all this, that the plaintiff, or the sheriff, where garnishment has been resorted to, can touch or disturb the money of a defendant, reached by the process before judgment against the latter. C. P. Art. 247, gives the garnishee, confessing, the right to bond the money reached, or deposit it in court, while C. P. Art. 257, in directing the sheriff to take and keep the property attached, especially excepts sums due the defendant by the garnishee, and C. P. Art. 264, provides for, in cases of traverse, only a contingent judgment, subjecting the money or property affected, to the decree when obtained against the defendant.

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*Court of Appeals, Fifth Circuit, Parish of St. Mary.*

SUSAN W. PARNELL, Administratrix, v. WM. P. ALLEN.

1. Homestead laws, being in derogation of common right, must be strictly construed.
2. A party claiming a homestead under section 1691 of the Revised Statutes, on the grounds that he has persons dependent on him for support, must show that dependence to be *actual* and *necessary*.
3. The fact of being the head of a family *per se*, does not entitle a party to a homestead under said section.
4. The exemption right must be tested by the state of facts existing at the time the same is sought to be enforced.

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Parnell, Administratrix, v. Allen.

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*Appeal from the Nineteenth Judicial District Court of the Parish  
of St. Mary. Goode, Judge.*

*Don Caffery* for plaintiff and appellant.

*H. W. Allen* for defendant and appellee.

BLAKE, J.—Defendant claims exemption from seizure of his mortgaged premises, under the provisions of the homestead act, on the grounds that he is the head of a family, and has persons dependent on him for support.

The defendant is a widower, with four children, three sons and a daughter, all of age. It is shown that the three sons are able to support themselves, and the daughter, who resides with her father, is a healthy, portly and active young lady, possessed of an inheritance of twenty-five hundred dollars, and the owner of property in Franklin. It is, however, claimed that the inheritance has not been realized, and that the property in Franklin is encumbered. To what extent the inheritance has not been realized, and as to the value of the Franklin property and the amount of its encumbrances, the record does not inform us.

The issue, as we look upon it, is narrowed down to a question of fact, as to whether the defendant has any person or persons dependent on him for support, so as to entitle him to the benefit of the exemption of the homestead act.

The Supreme Court, in 33 La. An. 320, in interpreting section 1691 of the Revised Statutes, which provides for a homestead in favor of the debtor, having a family, or mother, or father, *or persons dependent on him for support*, declared it to mean persons dependent for *actual and necessary* support, and not persons able to earn a living.

We are satisfied from the evidence in this case, that the defendant's children are not dependent on him for actual or necessary support. The sons are robust and healthy, and, as a matter of fact, do support themselves; and the daughter is possessed of some means, and is able to provide for herself. The evidence impresses us that the dependence is the other

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way, and that the children are better able to support their father than their father to support them.

In the language of the decision referred to, "adults, male, or, if unmarried, female, who have robust health and all usual faculties, lie under the necessity of supporting themselves, unless they find others willing to support them, who can do so without making such service a foundation for exempting their property from liability to the payment of their just debts."

The mortgage in this case was granted prior to the constitution of 1879, and the exemption right set up does not come under its operation, but must be tested by the act of 1865, commonly known as the homestead act, and embodied in Code of Practice under article 645, and must be governed by the state of facts existing at the time that the exemption is sought to be enforced. 32 La. An. 979.

In adjudicating on the rights of parties, we must not lose sight of the fact that the property of the debtor is the common pledge of his creditors, and that homestead laws, being in derogation of common right, and, as such, coming within the exception of the general rule, must be strictly construed, and never extended beyond the express terms of the law-maker. 20 La. An. 64; 28 La. An. 666.

From all the light before us, we fail to see that the defendant has brought himself within the letter or spirit of the homestead act, so as to entitle him to the exemption he claims in this case. The fact of being the head of a family *per se*, does not entitle him to such a right. 33 La. An. 320.

It is, therefore, ordered that the judgment of the lower court, in so far as the monied demand, and the recognition of plaintiff's mortgage are concerned, is affirmed, and it is ordered that that portion of the judgment postponing the execution of the mortgage, be reversed and set aside, and that there be judgment in favor of plaintiff, declaring her mortgage executory; defendant and appellee to pay costs of this appeal.



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Nagel v. Madere et als.

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*Court of Appeals, Fifth Circuit, Parish of St. John the Baptist.*

ANDREW NAGEL, Appellant, v. CLEOPHAS MADERE *et als.*,  
Appellees.

1. Where the waters used for purposes of irrigation on a rice farm percolate through the enclosing levees, and injure the crops on an adjoining sugar plantation, notwithstanding the rice planter has exhausted *all* the usual and customary modes to prevent the seepage, and protect his neighbor, the damage resulting therefrom will be *damnum absque injuria*.
2. In cases where the testimony is either doubtful or conflicting, Courts of Appeal will not lightly disturb either the findings of juries or the judgments of courts *a quo*.

*L. DePoorter* for appellant.

*Jas. D. Augustin* for appellees.

SMITH, J.—This is an injunction suit, coupled with a prayer for damages alleged to have been sustained by reason of the waters from defendants' rice farm flowing or passing on to the property of the plaintiff, and injuring the crops of sugar-cane and corn planted and growing thereon.

The defendants answered—first, pleading the general issue, and, for special answer, setting forth that they were rice planters; that their occupation was one authorized by law; that they had complied with all legal requirements relative to their rice flume, and had taken all necessary precautions to protect the adjoining proprietors from injury by the waters on their rice lands. They further respond, that the plaintiff has failed to take the usual and necessary precautions to protect himself, etc., etc.

On these issues the parties went to trial, which resulted in a judgment dismissing plaintiff's injunction, and rejecting his demand for damages. From this judgment the plaintiff has appealed.

We admit the legal proposition, as advanced by plaintiff's counsel, "that no one can pursue his occupation with disregard of the rights of others;" and we will here add, that every person is required only to take those precautions against injury

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to others which the peculiar nature of his business or calling would naturally demand.

It is the policy of the law to foster *all* the agricultural interests of the State, and the cultivation of rice has become an important one in Louisiana.

The evidence in this record, to say the least of it, is voluminous and conflicting; and while there seems to be proof of some damage to the plaintiff, there is, on the other hand, ample evidence going to show that the defendants had cultivated their rice lands in a careful and proper manner; that they had constructed the necessary levees and ditches to control the waters on their lands; and it is further in evidence that a common road, some eighteen feet in width, separated the properties of plaintiff and defendants to their entire depth.

In cases of doubtful or conflicting evidence, Courts of Appeal will not lightly disturb either the findings of juries or the judgments of lower judges before whom the testimony was given, and who had full and ample opportunity to weigh and consider the evidence as it fell from the lips of the witnesses. Of this nature we consider the case now before us; and, viewing *all* the testimony found in this record, we must decline to disturb the judgment of his honor, the judge of the court *a quo*. *Dreyfus v. Lincoln*, 1 McGloin 313.

Judgment affirmed.

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No. 142.

HEMPHILL, HAMLIN & CO. v. MAX. BRAUN.

1. The fixing by the judge *a quo* of a wrong day of return, is not a fault imputable to appellants; nor is the case affected by the fact that the motion for appeal is in the handwriting of appellants' counsel, and the erroneous return day is suggested in such motion.
2. A judgment or order refusing a new trial does not require signature by the judge.
3. Where the bond is for the amount fixed by the court, the appeal will not be dismissed, even if filed too late for a suspensive appeal.

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4. Insolvent laws are for the double purpose of relieving honest debtors, and of ensuring justice to creditors.
5. The power of the States, in the absence of national legislation, to enact and enforce such laws, is no longer questionable.
6. The non-resident creditor can claim no greater rights than the resident, when he invokes the resident jurisdiction.
7. There can be no *vested right* in any particular form of remedy; and the States have under their control the remedies which are to be invoked within their own courts.
8. The law dissolving pending attachments, in cases of insolvency, must be enforced against a non-resident who has sued in the courts of the State.
9. He cannot, however, be forced to cumulate his suit with the proceedings in insolvency.

*Appeal from Civil District Court, Division A. Tissot, Judge.*

*E. H. Farrar* for plaintiffs, appellants.

*Braughn, Buck & Dinkelspiel* for defendant.

ON MOTION TO DISMISS.

ROGERS, J.—The judges of the district court, when granting orders of appeal, in fixing return days should be governed by the rules of this court; but the fact that a judge, in fixing a return day, as in the matter before us, passes the earliest day upon which a return should be made, and fixes a subsequent one, fault will not be imputed to the appellant, unless the facts are so brought to the attention of the court, that it can be properly ascertained and determined whether the order of court granting the appeal resulted from an error or fault attributable to appellant. The fact that the motion is in the handwriting of counsel, and the day of return written in the motion by counsel, is nevertheless an order of court when granted, and is the act of the judge. 31 La. An. 595, and dissenting opinion of Fenner, J.; 32 La. An. 696.

▲ judgment refusing a new trial does not require the signature of the judge. No appeal will lie from such judgment. Therefore, when a judge, after refusing an application for a new trial, at once signs a judgment, the delays for appeal commence to run from such signing.

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The judgment in this case was signed on May 7th. The motion for appeal was in time, but the bond, which was filed on the 23d, could not suspend execution of the judge. The amount of bond herein, however, having been fixed by the judge, and furnished by appellants, the appeal will not be dismissed.

The bond declares the appeal is taken from a final judgment rendered in the Civil District Court in the matter of Hemphill, Hamlin & Co. v. Max. Braun, against the plaintiffs. There can no dispute arise on this: the description is sufficient to permit a recovery.

Motion overruled.

#### ON THE MERITS.

Plaintiffs, residents of the State of New York, creditors of defendant, holding the notes of the latter, brought this suit for the recovery of the debt, obtaining a writ of attachment, by virtue of which the sheriff seized certain property. After the issuance of the writ, and pending the seizure, the debtor made a voluntary surrender of his property, under the insolvent laws of this State. The syndic of the insolvency proceeded by rule, against plaintiffs for a stay of proceedings in this suit, for the release to him of the property attached, and for the cumulation of this case with the insolvency proceedings of Max. Braun. The plaintiffs resisted, on the ground that, being non-residents, the insolvency laws of this State could not affect them; that their attachment could not be disturbed, nor their proceedings stayed, or in any wise interfered with, by reason of any order rendered in said insolvency.

ROGERS, J., after stating pleadings and facts:—These notes are dated in 1879. The congress of the United States, in 1878, had repealed the general bankrupt law, and the insolvent laws of this State, which had for more than ten years been suspended, revived. From the date of the notes until their maturity—to the instant of this suit—no change had been made in the laws of this State, which impaired either the rights of plaintiffs, or remedies to secure those rights.

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Insolvent laws were enacted for the humane purpose of protecting honest but unfortunate debtors;—"conceived as much in a spirit of mercy to the debtor, as of justice towards the creditors." *Plympton v. Preston*, 4 La. An. 356.

And the power of the States to enact such laws, and to enforce them among their own citizens, is no longer to be considered as questionable. 4 *Wheaton* 122 (419), *Sturgis v. Crowninshield*; 12 *Wheaton* 213, *Ogden v. Saunders*.

And the fullest consideration has been given the subject, in all its phases, by the highest judicial tribunals of the country, and nothing, it may be said, is left to conjecture.

In the present case we are not called upon to determine whether plaintiffs have the right to insist on the fulfilment of their agreements with defendant, and to proceed to judgment. We are only to determine whether they have a right to pursue the remedies invoked by them in the proceedings taken before one of the tribunals of this State—called upon to administer the estate of a debtor for the benefit of all his creditors, a part of which estate had been attached on the complaint of this only ordinary and non-resident creditor, on the grounds of an alleged attempt at unfair dealing, in favor of preferred parties, to the injury of all other creditors, including plaintiffs.

At best, a non-resident creditor can claim no greater right than a resident, when he invokes the aid of the resident jurisdiction; and the remedies which this State extends to all, foreign and native alike, are no more sacred in defence of the one than the other before her own forum.

We are called upon to determine the effect of a proceeding which simply works a modification of a remedy claimed by a creditor in executing a contract made in this State, and sought to be executed in this State. The plaintiffs claim no privilege or preference over other creditors, nor to or upon any of the insolvent's effects; and, in fact, they have none. The laws of Louisiana authorizing the *cessio bonorum* have existed, as it is now understood, since 1817, long before the contract evidenced by the obligation in this case was made.

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The remedy by attachment, urged by plaintiffs, was not a part of their contract. It is true that the law of attachment, as invoked, existed when they received the notes. It is also true that at the same time, and by virtue of the same sovereign authority, existed a law to which the courts of the State are bound to give effect; and that law provided, as a modification to one of the remedies given to enforce a contract, a cession by a debtor, which, by a stay of proceedings, suspends action, and protects him when unfortunate and harrassed, and when it is evident his creditors can receive no benefits from vexatious process.

Cooley on Constitutional Limitations, page 360, correctly declares: "The right to a particular remedy is not a vested right (the exception when the remedy is a part of the right itself). As a general rule, every State has complete control over the remedies which it shall afford to parties in its own courts. \* \* Any rule or regulation in regard to the remedy, which does not, under pretence of regulating it, impair the right itself, cannot be regarded as beyond the proper province of legislation."

These conclusions result from the adjudications of all courts, State and federal. We have no doubt of their application to the cause now under consideration.

The judgment is affirmed—except so far, however, as it orders a cumulation of plaintiff's suit with the insolvent proceedings. We do not consider the court is authorized to direct the manner in which plaintiff shall preserve or prosecute his rights, such as he may have. Appellant paying costs.

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#### CONCURRING OPINION.

MCGLOIN, J.—I fully agree with my learned colleague in the position he assumes in disposing of this cause. It is now conceded that, in absence of national bankrupt legislation, the States have authority to adopt insolvency laws, for the purpose of distributing the assets of a broken debtor; and, in consideration of an honest surrender, granting him a discharge. The

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only questions which may possibly be in controversy—if even these be so—relate to the effect of such discharge against contracts not born within the limits of the State which grants the same, and against persons who, as non-residents, are to a certain extent beyond its jurisdiction.

If a State has the right, under any circumstances, to enact statutes of this character, they have, necessarily, the power to do all that is essential to carrying out the purposes of such statutes—of course, subject to the restrictions of the fundamental law. One of the principal objects of all legislation of this character is the fair distribution of the assets of the disabled debtor amongst his creditors. Certainly, to accomplish this, there must be provision for the judicial possession and partition of such assets. If one creditor, simply because he is a non-resident, may take or withhold any one piece of the insolvent's property, not specially affected in his behalf, and which, being within the State, is subject to its laws and to the jurisdiction of its courts, he may, under appropriate circumstances, take or withhold it all—defeating the operation of the statute, in one case partially, and in the other totally. This certainly would be the effect of holding, as we are expected by appellants to do, that, if a non-resident creditor is not subject to the insolvency laws of the State, his right to proceed against the property of his debtor, pending the *cessio bonorum*, cannot be restricted or destroyed. Assuredly, under such a view, a non-resident creditor would possess rights even more than sovereign in their nature. He could come within the boundaries of a State, and place himself above its sovereignty, and beyond its laws, although the latter be such as the State has an undoubted authority to enact. He could come into the courts of that State, and practically arrest the progress of its judicial procedure, in so far as his own interest required such arrestation. He could seize upon privileges which were lawfully denied a citizen of the State itself: so that, for the stranger there would be one and a higher law, and for the denizen another.

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If, under these views, a non resident creditor cannot withdraw, by attachment, assets already surrendered by an insolvent, neither can he, by virtue of such a writ, withhold such property from legal custody, even though the writ issued before the *cessio bonorum*. It can scarcely be contended that any particular form of judicial remedy enters into a contract, so as to make such special remedy a portion of such contract; and, therefore, as to it, preserved from alteration or withdrawal by the provisions of the federal constitution prohibiting the impairment of the obligation of contracts, and the divestiture of vested rights. The regulation of its own form of judicial procedure is a prerogative of the sovereignty of each State, of which the fundamental law of the nation has not deprived it, and which such fundamental law could never intend to place under the absolute control of individual citizens. There are matters which are above the plane of private contract; and this is of the number. Smooth and harmonious action in the courts is essential to the fair and speedy administration of universal, or rather general, justice; and without uniformity and system, such harmony and smoothness cannot be secured. If every man might stipulate for some particular form of remedy, and call upon the tribunal of the law to issue its citations, grant its hearings, and execute its decrees in such manner as he may have chosen to dictate, judicial chaos could not long be held at bay.

Therefore it is, that, as a matter of imperative necessity, these things are left to the control of the States; and the provisions of the federal constitution, already referred to, have been held to impose no obligation upon these commonwealths, beyond that of furnishing a remedy of some nature, reasonably sufficient for the protection and enforcement of contract and other rights.

The writ of attachment, and others similar, are exceptional in their nature, and merely preliminary. They are by no means essential to the enforcement of legal rights. They are accorded in some cases, and refused in others; and if they be



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of *absolute* necessity in some instances, they should be equally so in all. So, if the creditor to whom they are denied, and who has therefore only his ordinary process, has yet what must be considered an adequate remedy, it follows that one who, under special statutes, is more favored, still has his sufficient remedy remaining, if, for any cause, the legislature subsequently withdraws the exceptional rights, and reduces him to a level with ordinary creditors.

But it is well settled, that, so far as possible, all of the statutes of a State must be construed so as to harmonize, in order that all may be upheld. If the non-resident creditor, in this case, has obtained a writ of attachment, he did so by virtue alone of the law of this State to the case applicable. That law is no more solemn or operative than other statutes which allow an insolvent to apply to the courts, and require such courts to possess and distribute all his property. The latter modifies the former, and the writ, when issued, is subject to contingencies rendered possible by the latter. To maintain appellants' position would be to allow them to sunder the legislation of this State—accepting and profiting by one portion, and repudiating another equally constitutional. It would be to allow them to exercise, not the remedy actually created by the laws of Louisiana, but one larger and more peremptory.

The principle here contended for has received the sanction of our learned brothers presiding over the Circuit Court of Appeals for the first circuit of this State, in the case of August, Bernheim & Bauer v. Brown, 1 McGloin 261.

Thus far the judges of this court have gone together; and thus far, alone, perchance, it is necessary to go in the determination of this cause; and beyond this I have not solicited my learned colleague to accompany me. But, as I have had occasion to cite the case from the first circuit, which is in opposition to the opinion announced by the Supreme Court of the State, in Orr & Lindsley v. Lisso & Scheen, 33 La. An. 476; and as the issues in August, Bernheim & Bauer v. Brown, and those of the controversy we are now disposing of, are alike, not only upon the

points touched in the opinion of my learned colleague, but in other respects as well, I deem it necessary and proper to state, individually, that I do not approve of the doctrine laid down in the case at 1 McGloin 261, any further than it goes to uphold the particular proposition in support whereof it has been cited.

Under such circumstances, courtesy towards my learned brothers of the first circuit may, perchance, require me to state why I wish to guard against the possibility of placing this court in the attitude of an implied acceptance, in full, of August, Bernheim & Bauer v. Brown.

It is the misfortune of human legislation, that it is too often compelled, not so much to make choice between irreconcilable benefits or advantages, as to mark the course which, of necessity, lies between opposing dangers. Human foresight is so limited, and the power and latitude of change is so infinite, that the remote peril of to-day may become the proximate one of to-morrow: and what was the wisdom of the past may be the folly of the present. In the instance under consideration, the framers of the federal constitution had to navigate, as best they could, between the dangers of unbridled sovereignty, with the possible disregard and subversion of individual right upon the one hand, and the undue crippling of governmental power on the other, with a corresponding restriction of its ability to further or protect the general welfare. They seem, indeed, to have weighed with honest care every word that went to build up this portion of the fundamental law of the nation.

In the particular connection now under consideration, the prohibition to the States is against passing laws impairing the *obligation of contracts*. It is pretty well determined, by judicial construction, that the *obligation* here referred to is that of the civil or municipal law, whether express or implied, whereby such law recognizes and enforces the moral obligation that attaches to every contract innocent in its nature. This is reasonable, for the obligation of a contract is only a portion of it, or, perhaps more properly, a result; and the clause in question, by restricting itself to the *obligation* alone, compels us to

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seek diligently the exact meaning of the word. It may apply, as used, to the natural or the legal obligation, or to both. The natural obligation of a contract is founded upon the immutable principles of right, and is independent of human legislation. No tyranny of mere human legislation can reach it; for if one man stands bound in conscience to another, all the statutes that might be enacted to the end of time, cannot shake or destroy such right upon the one hand, and the duty upon the other. Human laws, therefore, in attempting, in this respect, to strengthen the divine, would be concerning themselves with what was vain; and doing a thing which would advance no interest of humanity. It is not, therefore, to be supposed that the men of experience and deep wisdom, who framed the constitution of the United States, would engage themselves upon shadows such as this.

The legal obligation, however, is the means given by human law, to the individual, to enforce his rights. It is the lending of the power of the government to the citizen, to aid him in the accomplishment of that which, in a state of nature, he would have to bring about by his own force or cunning. As, in the interests of society, the individual cedes to the State this right of personal compulsion against his debtor, the State, on its side, owes him a fair and efficient substitute. This, of course, the State must regulate and govern; but it cannot be justly denied to any one. In this connection it is, therefore, that the citizen must feel the tyranny of the State; and here was something in connection with which it might be unwise to leave the subordinate commonwealths with untrammelled powers. This was the only *obligation* that it was in the power of the framers of the federal constitution to foster or protect; and this, it cannot be doubted, was the only one with which they concerned themselves.

The special language of this provision shows that at the time it was constructed, or chosen, the danger of an undue interference with the sovereign powers of the States was recognized, and that there was the purpose to trammel it as little.

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as possible, consistent with the accomplishment of the particular end in view. The dominion of the sovereign power over the question of contract must necessarily be wide. All persons cannot safely be trusted to contract; hence minors, interdicts and married women are placed under restrictions. Though it be a matter of consent, every meeting of minds should not create a contract, else men might suffer grievously through error, force or fraud; or the unconscionable taking advantage of particular circumstances, as the extortion of usurious interest, or the exaction of a man's watch, his horse, or his house and lands, for the morsel that keeps him from starvation. All matters cannot be made the subject matter of a contract, as where men agree to do an illegal or otherwise wrongful act, or to dispose of their personal liberty, or to waive homestead or other rights of similar character. Every completed contract, even, should not be permitted to stand, as where one purchases property subject to concealed redhibitory vices, or leases a house for a term, which is subsequently, to any serious extent, impaired in its usefulness. Some agreements must be placed beyond the reach of perjuries, or freed from the uncertainties of verbal convention; hence stipulations of such character must be in writing, or even, in cases, by public act.

The States, as a matter of course, are charged with the determination of these questions, as matters of public policy; and the national constitution would have been treading upon dangerous ground had it attempted, in this regard, to control their powers. It has not, however, so attempted, for it does not apply its language at all to the contract, but simply to its *obligation*. Of course, until there is a *contract* there can be no *obligation*, in this connection. As it is the legitimate province of the sovereign to define what shall constitute a contract, to declare upon what terms and conditions one may spring into being and continue its existence, and as the States never surrendered this prerogative to the general government, it remains with the States, unimpaired.

The language of the constitution practically says to the

States : Regulate the matter of contract as you please ; say what shall be a contract, and what not; how it shall be brought into being, how maintain its existence, and how be extinguished: but, when once that which you permit to be considered a contract has been ushered into life, you shall not take from its beneficiary all means of its enforcement. Therefore it is that this clause of the fundamental law of the nation, and that against the divestiture of vested rights, do not restrict the power of State legislation in this regard ; they only preserve existing contracts from injury or destruction. From the moment statutes affecting these matters become a portion of the law of the State, nothing violative of them can become a contract, as contemplated by the constitution ; neither can it *vest*, within the intendment of that instrument, any *rights* in one who attempts to violate the law.

If this reasoning be correct, it would seem to me clear, that the legislature of the State, if within its own constitution, may declare to its citizens: you are permitted to contract, and your debtor shall be bound to you in person and effects, or in property alone, or in some designated portion only of his property. This principle justifies laws shielding the person of the debtor from civil arrest; and homestead and other exemption laws. So the State may also dictate for the future, that a lawful obligation shall, as it were, die of old age, and fix the period of its life; hence, laws of prescription or limitation. Hence, also, as between citizens of the same State, insolvency laws have been generally conceded to be operative.

While following thus far the current of opinion upon these questions, I here must pause, and ask why, in this last connection, there should be a distinction between the citizen and the non-citizen ? If the public policy of a State demands an insolvent law, why may not the stranger, coming within the State to invoke its laws, be subject to such a statute of bankruptcy, as well as its own people ?

It may be well, before proceeding further, to touch briefly

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upon the nature and effect of these insolvent laws. There is in them intrinsically nothing that is tyrannical or unjust. On the contrary, I consider them exalted in purpose and in results. They are merciful to the debtor, and at the same time ordinarily beneficent to the creditor. They are as well advantageous, and often essential to the well-being of society itself. Commerce, with its ramified connections, its wide-spread systems of credit, and its alternations of inflation and stringency, keeps bankruptcy, as it were, constantly impending over the heads of its votaries. The manufacturer, common carrier, and the planter or farmer, are likewise in perpetual danger of insolvency. Of course, when any of these fail, capital, credit, etc., are gone; but an indebtedness which, even with these lost advantages, it was impossible to carry, remains to bear down the debtor. To such an unfortunate one, even if relieved of his obligations, the task of his own re-establishment is one of extreme difficulty. Permit the load to remain upon him, and it becomes one almost of impossibility. It is, therefore, a mercy, and one which can ordinarily work no real injury to creditors, to lift from the shoulders of such men the incubus of a mass of debt, which, in all probability they will never be able to pay; thus enabling them to start out once more with a reasonable prospect of success upon the road to competence.

Where a State does this for the broken debtor, it preserves a citizen, not entirely bereft of all power of advancement, and one who is impelled, by a reasonable hope, to further efforts; remaining thus a contributor to the national wealth, instead of a mere consumer. Where, however, it denies this relief to its disabled ones, it leaves them with spirits crushed, and without power to rise again into the ranks of those who, while furthering their private interests, are also increasing the aggregate of the nation's wealth, building up its commercial, agricultural or manufacturing interests, as the case may be, and raising the standard of its influence and power.

Furthermore, there are great calamities, such as war, invasion and the like, which befall a country and reduce it to bank-

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ruptcy, or its very verge. They pass away eventually, but the property of the people is gone, or greatly diminished, while their debts remain intact. Shall a nation, under such circumstances, permit the mass of its citizens to remain despondent and in lasting insolvency? Shall it have no power to impose upon the creditor class, its fair proportion of the general loss; and extend to all that served or suffered in the hour of need, the opportunity, at least of starting again fresh and free?

Finally, when men become embarrassed, creditors too often engage, as it were, in a trial of speed, to appropriate, each to himself, the assets, and overwhelm the debtor with the heavy law-charges and other injuries of accumulating seizures. The result, in the absence of insolvent laws, ordinarily, is that one or more of the debt-holders is paid in full, with heavy judicial expenses, while the remaining creditors receive nothing, having left to them only barren demands against a broken debtor, who, in all probability, will never again possess property to seize. Bankrupt laws check such ruinous contests of celerity, take from the debtor all the property he possesses and distributes it fairly among all the creditors. In consideration of the debtor's honest disclosure and surrender of all his assets, of the withdrawal from him of control over his own affairs, and the assumption of his rights and duties as to present property, towards all his creditors, the law grants such debtor a discharge from his obligations. Surely such legislation is not unilateral, but advantageous to creditor and debtor alike, and consequently in the interest of both.

For these reasons, civilized nations have always claimed and exercised the right of enacting insolvency laws; and most of them give to such legislation a permanent place upon their statute books. Moreover, such nations not only protect their discharged debtors against creditors that are their own subjects, but so long as such debtors remain at home, they shield them from the pursuit of aliens as well. What subject of Great Britain would dream of appearing in a French Court to prosecute a citizen of France, after the discharge of the latter

under the laws of the French Republic? So, what court of this country would enforce a British claim against an American citizen, discharged under the bankrupt laws of the United States, when such laws were in force?

The States of this Union are in all respects, where their powers are not restricted by fundamental law, as sovereign as any of the nations of Europe or of the world. What any of the latter may lawfully do, this any American State, under the restriction mentioned, may likewise do. It is conceded that the federal constitution does not deprive the States of the power to enact insolvent laws, so far as they affect contracts of the future. If, therefore, they have this sovereign power remaining to them, how does it happen that this power is one thing when exercised by a State, and another when exercised by the general government of the United States, or by the other governments of the world? If the State of Louisiana cannot, by its laws of this nature, affect the claims of a citizen of New York, because the latter is in person without its territory, how does France strike the debt due a resident of London, or the United States one that is due a person dwelling in Paris? When it is argued that the New Yorker may attack his Louisiana debtor, not alone if such debtor be found in person or property within the State of New York, or of Ohio, but within the State of Louisiana itself; is it not argued as well, that the Londoner should be similarly heard in Paris, or the Parisian in America?

I am not prepared to assent, on general principles, to the doctrine, that the laws of a country enter of themselves into the contracts of its people, as in the nature of implied stipulations. They are enactments for the determination of the rights of parties, where the latter have been either silent or ambiguous. They hold their course of their own vigor, and independent of individual consent. It is true, persons may be satisfied with the dispositions of the law and remain silent; but, under such circumstances they have not contracted, and they are not held or benefited by reason of any assent, express



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or implied, but by reason alone of the law's will. There has been no *aggregatio mentium*, properly speaking, and none was needed. Be this, however, as it may, it is nevertheless certain that the statutes of one State, as applicable to contracts, connot, *of right*, follow the contract beyond its borders, and impose themselves *volens volens* upon the legislature or courts of another jurisdiction. The principles of courtesy may *permit* this, and possibly do in most cases; but it is so only when the extraneous law is not in antagonism with the home legislation. The statutes of limitation of liens, exemption and insolvency laws, are all illustrations of this principle.

Particularly clear is it, that even within the State itself, its laws of the remedy do not enter into the conventions of its citizens; and equally certain, that a contract, passing beyond the bounds of its own State, to seek enforcement, carries with it none of the remedies, as such, of the State of its origin. However the case may be, as to its validity and interpretation its enforcement must depend entirely upon the law of the community to whose courts the appeal is made in its behalf. The clause of the federal constitution, against the impairment of the obligations of contracts, does not compel a State to afford the citizens of any other State, all the rights, or any of the remedies peculiar to such other State. All that can be required of any State, is to accord to the stranger the same rights and remedies that it has provided for its own people. Even if, by reason of his non-residence, a creditor is beyond the jurisdiction of a particular State, when he comes within its limits, to invoke the aid of its laws for the enforcement of his obligation, he must take those laws as he finds them. If they do not permit the arrest of the debtor, or the seizure of all his property, the fact that the statutes of his own State accord such remedies is of no service to him. Indeed, under the idea of fostering a high sense of individual honesty, or to abolish the system of credits, it is possible that a State might restrict its courts simply to the task of interpreting laws and contracts, or of debts, money disputes, and refuse them all power of com-

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selling payments or compliances. If such legislation were binding upon its own citizens, how should a stranger who, for his own purposes, introduces himself or his interests within its jurisdiction, escape its binding force?

Coming more closely to the case under discussion, the State of Louisiana does not permit the unrestricted appropriation of the debtor's property to the satisfaction of his obligations. It has its exemption laws and its laws of homestead. It goes further, and says to the creditor, "You may seize the property of the debtor, so long as he has not arrived at the condition of incapacity to satisfy all his debts, and has not, in the interest of all concerned and of the State itself, surrendered all his assets to the courts for lawful distribution. When such contingency, however, has arisen, the writ of *fiery facias* is no longer at your command; and your sole remedy is to demand and receive your share of the fund realized from the surrendered assets." Thus Louisiana attaches a condition to its laws of the remedy one admitted to be of force against its own citizens, and one which should govern the non-resident as well, so soon as he introduces himself, or his contract, within the jurisdiction of the State. To allow a stranger to come into the courts of Louisiana, and issue his *fiery facias*, or similar writ, even after a *cessio bonorum* and discharge, is to administer a remedy unknown to the laws of the State, and even in direct antagonism thereto. It is to hold the property of the debtor, where a sovereign State has said, in advance of the action, and for universal application, that it shall not be held.

I, therefore, must say that I do not see the force of the contention, as applicable here, that the laws of Louisiana cannot extend beyond its own limits to affect the contracts of other States. It is not attempted by legislation of the character in question to give her laws an extra-territorial application. So long as circumstances keep such contracts, and the interests they involve, beyond the boundaries of this State, the laws thereof do not reach it. If the extraneous creditor finds the debtor or his property outside of Louisiana, he may ignore

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our laws and proceed to enforce his debt. But, within the bounds of this State, the laws upon its statute-books are supreme; and if the interests of the non-resident creditor impel him to bring his contract to Louisiana for execution, it is passed at once under the dominion of the law of this State, as to its effects here, and it is concluded by it. At all events, he can only demand that laws of this State, as they are, be enforced in his favor; and to allow him to enforce them, ignoring their restrictions and exceptions, is to allow him to enforce a law which is not that of the State of Louisiana.

Furthermore, although the *person* of a non-resident be beyond the boundaries of a State or nation, any property or right he possesses within its limits is rightfully subjected to its legislation. So, any such property or rights that he may bring or send within the bounds of such State or country, passes at once under the full dominion of its laws, *past as well as future*. As to the application of this principle, no sound distinction can be drawn between property or rights which are to be seen and touched, and those which are not. The privilege of suing upon a debt, and seizing to satisfy it, constitute rights and interests as legitimately the subject of the legislation of every sovereign power, as real estate itself can be. The fact that these privileges of suit and seizure, as against a citizen, rest in an alien, does not in any manner detract from the power of a State's control over them. Of course, the effect of such legislation does not reach beyond the confines of the enacting State, to the person of the non-resident creditor, so as to affect him in other jurisdictions; but within the confines of such State, such laws are supreme. Thus, a New York creditor, although his sole interest in Louisiana may be the right to sue one of the citizens of the latter State, is bound, so far as the enforcement of his rights within the State of Louisiana are concerned, by the limitation or exemption laws its legislature may adopt, as fully as a citizen of such State would be. The position in reality is, that the law of Louisiana acts upon this right of suit, as it would upon the merchandise or real property

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of an alien. It fastens upon and affects the *rem*, and controls it only so far and so long as it may be or remain within the State. It follows from this, that where a resident of one State acquires the right to sue the citizen of another in the courts of the latter, that right of suit passes at once under the dominion of the latter State, and is affected by its legislation, past and future, precisely the same as though the right had sprung into existence strictly between fellow-citizens of the same commonwealth. Therefore, I consider that the insolvent laws of a State have a similar power and authority; and to apply them to the right of suit by an alien in this State, is not to extend the influence of our laws beyond our own borders, any more than it is where we enforce our prescription or limitation laws, or those of exemption, against all litigants, wherever be their domiciles.

The objection that insolvency proceedings are in their nature judicial, requiring due notice to bind, and that one who is not present in person or property cannot be reached by the process of the courts conducting them, is closely related to the one which has just been discussed. It will not be denied that, with the rights or property of an alien within a country, its courts, as well as its legislature, have the right to deal. If a man acquires either, within the limits of a State, he thereby consents to subject them to the action of its courts, as well as of its laws; for it would be strange, as well as intolerable, if the legitimate statutes of a State, affecting particular things within its bounds, could not be enforced by its judicial tribunals, simply because the owner of those things is an alien. If a non-resident falls heir to an estate, or receives a legacy, the courts of the State in which the succession lies may entertain a suit against him, to regulate the payment, delivery, or even the validity of the bequest. If he holds a mortgage or privilege upon property in the State, which is also similarly charged in favor of a citizen, the latter may force the stranger into the courts of his State, for a judicial determination of their conflicting rights. If he has a judgment in the State against a

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citizen thereof, the latter may sue him within the State for a judicial declaration of the nullity of such judgment. If he be a stockholder of any corporation within the State, he may be there impleaded in proceedings for the liquidation of such association. If he pretends to title to any property, real or personal, in the State, the true owner may cite him before the courts of such State, in an action of jactitation of title, or for a decree of nullity against his adverse title. If one who is only his ordinary agent, or an agent without authority to stand in judgment, dispossess a citizen of the State of his property, such citizen may invoke the possessory action against him, though he be not present in person or property, or by competent representative. If a citizen of the State dies, the probate court brings all the creditors in—alien or domestic—by publication, and determines their controversies and settles their rank. Illustrations of this character might be extended indefinitely, where the courts of the States should lawfully bring a non-resident before them, without citing him in person, and *without being able to seize property that belongs to him*. They take their jurisdiction as *to the rem*, which, in such cases, is the *intangible* property or right which, in justice to its own citizens, must be adjudicated upon. The fact that such rights are intangible, and so cannot be reduced to possession, cannot have the effect of exempting them from the control of the judicial tribunals of the State. If so, no estate of a deceased, and no insolvent corporation can be liquidated, so as to bind non-resident creditors. No questions of conflicting mortgages, liens, titles, or possession to, or of property can be determined, until the alien chooses himself to advance.

Upon the same principle, when a debtor falls into insolvency, and his resident creditors desire a *cessio bonorum*, or where he himself deems it advisable to provoke one, the matter presented for judicial determination, as between the creditors, is the relative rights of each in and to the assets or their proceeds, which the State has a right to regulate by its laws, and its courts to determine upon; for the only interest of the alien to

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be affected, is his right to hold that same property for his debt, and that right can have no existence outside of this State, and is therefore, to all intents and purposes, within the State. It is as much so, as is the non-resident's right, inchoate until accepted, to a legacy within the State, or to his remedy against the deceased for his debt. It is as much so, as is the alien's right to enforce his judgment, lien, or title, or demand, in the future, his dividends or share of assets in an insolvent corporation.

So, on the part of the debtor, his demand against his creditors is for that protection or exemption of his future property, within this State, which the law promises in consideration of an honest disclosure and surrender upon his part. The *rem* he brings before the court, is the right of the creditor to pursue him hereafter, *within this State*, for the debts placed upon his bilan or schedule; an existent right, which can be exercised only in this State, and, therefore, properly has its *situs* within the same, and is subject to its jurisdiction. This right of the creditor to pursue and seize presents a judicial question, which the insolvency of the debtor makes vital, and gives the court authority to restrict and otherwise regulate it, as between the creditors themselves; and equally is it sufficient to support the other branch of the same process, that for the relief of the debtor. The law says to the debtor do this and you are entitled to future exemption; and the debtor complies, whereby he is entitled to be declared free. A lawful and real issue is presented, under special sanction of the law, in which a citizen of the State has a substantial interest, and it affects a *right* of the non-resident, *existent only in this State*. The law may make such right, though intangible, a proper subject of judicial controversy, as fittingly as though it were tangible property; and this it has done.

These principles are not at variance with the authority of *Pennoyer v. Neff*, 95 U. S. (5 Otto) 714; for there a *creditor* sought to proceed against his non-resident *debtor*, without personal service or levy upon his property. In that case, as in

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this, a *personal* judgment against defendant could not be obtained. All that was open to the creditor, was to proceed *in rem* against the property of Pennoyer, located in Oregon. *As to that property*, the court of Oregon had jurisdiction; but it was tangible, and should have been brought before the court by seizure, and made, as it were, the defendant. The personal judgment obtained was null for want of service, and there were no proceedings *in rem* against the property. Furthermore, the litigation did not involve the status of that particular property, for the settlement of any adverse claims or titles thereto. Had, in that case, the property, instead of being real estate, been some right intangible, and had the litigation had for its object the necessary determination of the status of that intangible property, or the settlement of disputed rights or claims therein or thereupon, I do not believe the Supreme Court of the United States would have denied the jurisdiction of the lower court to entertain and determine the controversy.

The principle which is here contended for, is, in this particular connection, of universal recognition and practice in all civilized countries. The United States itself has recognized and respected it. Bankrupt proceedings, the world over, bring in the alien creditor without seizure of his property, and necessarily by constructive notice. Who has questioned the jurisdiction of the courts of the nations of Europe, to so implead aliens in such proceedings? Have not foreign and non-resident creditors been thus forced, time and again, into the bankrupt courts of the United States, and the judgment discharging the debtor been always held as obligatory within the bounds of this Union? If it is proper for such governments to authorize the impleading of foreigners in such cases, by what logic is it unlawful for the States to do the same? Are the latter not sovereigns as well as the others, and are they not to be judged by the same rules of international law?

The Holy Writ declares: "Diverse weights and diverse measures both are abominable before God." I cannot disabuse

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myself of the impression that the rights of the States have, in this connection, been weighed and measured by one standard, and those of the national government and of other independent nations by another.

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*Court of Appeals, Fifth Circuit, Parish of Plaquemines.*

**A. OLSTEIN v. HIS CREDITORS P. E. SARRAZIN AND T. A. BALLOWE, Appellants.**

1. Whenever an opposition to a syndic's account is filed by any one creditor, there is a *contestatio litis* formed, wherein said creditor is plaintiff and the other creditors are defendants in a *concurso*, and the issue cannot be tried and determined in chambers.
2. Section 1936 of the Revised Statutes does not authorize the judge to try and dispose of an opposition to a syndic's account in chambers. It confers on that officer the power to grant preliminary orders simply, and such as are not required to be granted in open court.

*Appeal from the Twenty-Sixth Judicial District Court, Parish of Plaquemines. Liraudais, Judge.*

*F. C. Zacharie* for plaintiff and appellee.

*T. A. Flanagan* for defendants and appellants.

BLAKE, J.—The provisional account filed by A. Davis, syndic, of the insolvent Olstein, was opposed on various grounds by two of his creditors, P. E. Sarrazin and T. A. Ballowe. The district judge assigned a day for the trial of these oppositions, and disposed of the same at chambers. From this action of the judge this appeal is taken.

The position assumed by the syndic, and which seems to have been adopted by the judge, is that his authority for thus disposing of these oppositions at chambers is to be found in section 1936 of Ray's Revised Statutes.

In our opinion the section in question will not bear the construction placed upon it. It simply authorizes the granting *ex parte* of such orders as are preliminary, and not such as are required to be granted in open court.



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Whenever a creditor in a *concurso* opposes a syndic's account, there is a *contestatio litis* formed, wherein the opponent is regarded as plaintiff, and the remaining creditors as defendants, and the issue raised in that opposition, like all litigated matters must be tried and determined regularly and in open session of the court. This is the general practice recognized and sanctioned by law, and which admits of no exception.

Ordered that the judgment rendered at chambers be reversed, and case remanded to be regularly tried in open session; appellee to pay costs of both courts.

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*Court of Appeals, Fifth Circuit, Parish of St. Charles.*

EMILE FOSSIER, Appellee, v. MORGAN'S LA. AND T. R. R. AND S. S. COMPANY.

1. In cases of injury to live stock, railroad companies will be held liable, when their employees, by exercising the necessary vigilance, might have seen, at a proper distance, the animals on the track, and with due regard to the safety of the passengers, have stopped the train before it struck them, but failed to do so.
2. Where there is no written motion filed, asking an amendment of the judgment appealed from, this court will not entertain an application made in counsel's brief for such amendment.

*Appeal from the Twenty-Sixth Judicial District Court, Parish of St. Charles. Hahn, Judge.*

*Jas. D. Augustin* for appellants.

*L. De Poorter* for appellee.

SMITH, J.—Defendants are appellants from a judgment rendered by the honorable the Twenty-Sixth Judicial District Court, for the parish of St. Charles, condemning them in the sum of one hundred and fifty dollars, as the amount of damages inflicted by their western-bound passenger train running into and killing a mule, and permanently injuring a colt, both the property of the plaintiff, on the morning of the 18th day of September, 1881.

As the facts of the killing and injuring and ownership of the

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animals in question are fully proved, the next proposition presented for our solution is that of negligence on the part of defendants' employees, an inquiry peculiar to all cases of this or a kindred nature. Negligence, in a legal sense, is the failure to observe for the protection of the interests of others that degree of care, precaution and vigilance which the circumstances justly demand, whereby injury is inflicted.

In cases of injury to live stock, the best authorities hold railroad companies liable when their employees, by the exercise of the necessary vigilance, might have seen, at a proper distance, the animals on the track, and, with due regard to the safety of the passengers, might have stopped the train before it struck them, but failed to do so. See 20 La. An. 158; 15 La. An. 105; Pierce on Railroads, page —

A careful examination of all the evidence in the record has failed to convince us that the judge of the court *a quo* has erred. We think there was blame attaching to the defendants' employees, amounting to gross negligence in not resorting (under the circumstances of this case, as shown by the evidence), to the usual and customary modes employed to frighten cattle from the track, and thus, at least, having made the attempt to avoid the accident. It is shown by the testimony that the accident in this instance occurred on a part of defendants' road, where the mule killed and the colt injured could have been readily seen by the engineer in ample time to sound the usual alarms, or, if necessary, even to have stopped his train before reaching them. Neither of these precautions was resorted to. The train was running at a high rate of speed, in the immediate vicinity of a bridge and a regular station, and the whistle was sounded and the train checked up after passing the whistling post, and after the accident had occurred.

There is material conflict, too, in the testimony of defendants' witnesses, and even their own version of the matter would scarcely exonerate them from the charge of negligence sufficient to fix the liability of their employees. On the other hand,

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the testimony adduced for the plaintiff seems fully to bear out and justify the conclusions of the district judge.

As there is no written motion in the record, asking an amendment of the judgment of the lower court, so as to allow the damages claimed by the plaintiff, for injury to his colt, we cannot entertain the application as made in his brief; and not being properly before us, we express no opinion relative to the judgment of the court *a quo* on this portion of the case.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be affirmed; defendants and appellants to pay costs of both courts.

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No. 162.

## SUCCESSION OF PATRICK CONDON.

1. Under the laws of this State, aleatory or gaming contracts are void.
2. Whether a contract be aleatory or not, is a question of intent.
3. A contract for the sale of cotton futures, where neither delivery nor payment of price is contemplated, but only an adjustment of differences, is aleatory and void.
4. The intent to wager may be implied, and circumstantial evidence is admissible to show its character.
5. The courts are not bound, in these cases, by the form or expressions of the contract, nor by Cotton Exchange rules.
6. The manner of settling prior transactions between the parties, similar to the one under investigation, may be considered.
7. Likewise, the manner in which the particular contract itself has been adjusted.
8. So, also, the fact that the parties were in no condition to make or accept delivery or payment.
9. In such a case, the particular contract being one out of many, all going to form the business known as dealing in futures, the general character of that business is a proper subject of investigation.
10. The fact that a dealer in futures fills or executes, through the agency of some other firm, the orders he has received, does not render such dealer a broker.

*Appeal from the Civil District Court, Division B.  
Houston, Judge*



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tingency of a rise or fall in the market price of any commodity, or, on the other hand, place their ventures upon the turn of a card or the cast of a die. Indeed, if it be wrong or against public policy to rest one's hopes for fortune, or to venture what one already has, upon matters of mere chance, that species of gaming which intrudes itself into the places of commerce, and mingles itself with the flow of the legitimate business of a country, must be by far the most dangerous of all wagering. It is so, because it scorns the secrecy of mere card-playing, and holds its glittering temptations perpetually in the eyes of men; because it escapes the odium usually belonging to common gambling, and claims to rank as a branch of legitimate commerce; because it deals in millions, where other gaming handles only its thousands or hundreds; and because its effects bear not simply upon the player himself, with his own immediate family, but upon the entire community as well, inasmuch as it perpetually menaces the harmonious working of the law of supply and demand in the matter of regulating prices.

Courts which would direct their efforts at the enforcement of legislation of the character under consideration, against the mere card-player alone, or the ordinary better of any kind, and shrink from extending a similar treatment to his more dangerous and powerful brother, the commercial gambler, would merit the contempt of honorable men.

When, however, the judicial tribunals are called upon to scrutinize particular contracts between merchants, or between persons styling themselves such, with a view to ascertaining whether such contracts be aleatory or not, the task is often one of great difficulty. The element of chance must enter largely into all commerce, and men, for legitimate purposes, may enter into conventions that are unimpeachable, but which yet must of necessity be affected, as to the pecuniary interests of those concerned, by the future conditions of the markets. Thus, the merchant, laying in his customary stock, may profit or lose by fluctuations in prices, before his wares are entirely disposed of. The same merchant, unwilling to charge himself

with the expense or trouble of caring for a great accumulation of merchandise, may stipulate for future deliveries, in lots and at times to suit his trade. In this last event the profit or loss of purchaser and vendor must depend largely upon subsequent variations in prices.

The legitimate trader, however, in these cases, differs from the commercial gambler in this, that, while he assumes, possibly against his will, the risk of future fluctuations, his expectations of profit do not rest alone upon the chance of a rise. He acquires at one figure, which, by reason of the largeness of his dealings, or for other reasons, is less than that at which the generality of men can acquire, and he sells at an advance to those who seek him. The commercial gambler, on the other hand, contemplates no such legitimate course, or methods of securing his profits, but founds his hope of fortune alone upon the chance of a fluctuation in prices favorable to himself.

There is, likewise, a character of speculation which, while it rests its expectations upon the chance of future variations in prices, is, nevertheless, not to be designated as commercial gambling. A man may believe that rising markets are ahead, and invest his money in purchasing with a view to taking advantage of the rise he foresees. In such a case, however, he executes a real contract of sale, acquires and takes property; and the one from whom he purchases has no remaining interest in the transaction, except to receive the stipulated price; and between the two there are no conflicting hopes to balance in the scales of chance. So, the mere speculator may be unwilling to charge himself with the custody of the property while he awaits the coming advance, and therefore he may stipulate for a future delivery. Even yet, however, he differs from the commercial gambler. The speculator in the case last supposed makes a true contract of sale, and the price is absolutely fixed and paid, or to be paid, no matter what may be the course of the market. So is the property itself to be similarly and certainly delivered. The agreement itself, whatever may be the eventual profit or loss to either party, has in it nothing of the

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element of chance. The commercial gambler, however, really makes no sale, and contemplates no delivery or receipt, and no payment of a price. He merely selects an opponent at play, and pits his own judgment against that of the latter, just as one who bets at cards or upon a horse-race might do, only the matter upon which the stakes are laid in his case is the state of the market, as to some particular commodity, at some special date in the future. With him, payment either way depends solely upon chance, as does also the amount, if any, which is to be paid.

Thus it will be seen that as to the contracts themselves there is no confusion, and that, in fact, the lines of distinction are clearly drawn. The difficulty lies generally in ascertaining the intent of the parties, as a question of fact, for upon such intention all cases of this nature must turn.

In striving, however, to solve this issue, it must not be forgotten that these matters are not beyond the pale of inference. The mutual intention of gaining is not, and need not always be expressed, but it may be implied from circumstances. In other words, in striving to find out what was the actual intent in such cases, the courts may have recourse to circumstantial evidence, with as much profit and propriety as they could do so in any other investigation after the facts. Indeed, in an inquiry such as this, where the scrutiny is not held in the interest of parties, but in that alone of public policy, the tribunals are in no manner bound by the expressions that may be in the particular contracts that are being judged. It is not only possible, but very usual for parties to attempt to clothe their vicious contracts with the forms and appearances of legality; and in such cases the courts are not precluded from searching rigorously into such deceptions, in order to prevent the defilement of their dockets by suits which are really illegitimate, although wearing the garb of legitimacy. To hold otherwise would be to make wrong-doing invincible the moment it enters into an alliance with cunning. It would also reduce the laws under consideration, and others of a similar character, to the

condition of mere dead letters ; for men are ever shrewd in the matter of disguising whatever they have done that is of an evil nature.

The case that is now before us discloses many facts that come properly within the domain of circumstantial evidence. The parties had had together prior dealings of the same kind as those under investigation, and which were carried forward to final completion or determination. As such anterior transactions were, it may be presumed that the ones being considered were intended to be. In all such antecedent contracts, there was simply a settlement for differences in prices, and no delivery of goods or payment of purchase money. See *Buras' Appeal*, 55 Penn. 298.

The very note sued on is the result of similar adjustments, representing a balance against Condon, after partial payments, upon settlements of differences in prices, all without deliveries of payment of considerations. While it is true that parties who have made a legitimate contract for future delivery, may subsequently agree to settle it by simply paying differences, and while it may be fairly claimed that the rights of parties in such cases are to be determined according to the intention as it originally existed, yet it cannot be denied that, as result discloses cause, so the manner in which persons eventually execute their contracts may be fairly inferred to be the one in which it was originally intended that they should be executed.

The parties in this case, at the time of their transactions, had no cotton on hand to meet the obligations assumed, nor did they at any time subsequently acquire any with a view to meeting their contracts. Condon was not a regular operator in actual or spot cottons, and he was without the means to handle the same in any considerable quantity. The dealings between him and Bignon were all upon the market in New York—a place wherein Condon, a resident of New Orleans, had no facilities for receiving or holding cotton. Incidents such as these, while any one of them alone might not be sufficient to determine the cause, are certainly corroborative of each other, and of other circumstances which may exist with them.



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A strong inference, in our judgment, arises from the fact that these particular contracts form part of a line of dealing that has grown to be immense, and to which alone the term "cotton futures" does, or can apply. They form, as it were, drops in a mighty tide of business that flows through the cotton exchanges of this city and of New York. Their nature may, therefore, be fairly judged by the general character of the class or kind of dealings with which they are thus assimilated. The court may legitimately examine into the general characteristics of this business as a whole, and impute, in default of sufficient contradiction, such general characteristics to each particular agreement that goes to make up the aggregate. It is shown affirmatively in this case that actual delivery and payment of price is a matter of rare occurrence in the history of these transactions. It is also shown that it would not be possible to bind this business down to actual delivery, because the total of its operations exceeds many times the aggregate of all the cotton to be found in the country. This, it will be borne in mind, is in addition to the commerce in spot cottons, which must at least be commensurate to the amount of the staple actually grown.

How can it be reasonably contended that a system of dealing in futures, which, in its proportions, is so infinitely beyond the capacity of the nation for the production of the article it claims to handle, can be one which, as a system, does not contemplate or involve a mere wagering upon prices?

All of these facts we consider as establishing, by sufficient presumption, the accountant's contention, and as making good his defence, in default of contrary proof from the holder of this note. In other words, we consider that they have shifted the burden of proof, and that, being uncontradicted, they justified the judge *a quo* in his finding.

The rules of the New Orleans Cotton Exchange have been submitted to us and argued upon by both parties. As the contracts, however, were made before the coming into force of these rules, and upon the markets of New York, we do not see

the connection they can have with this case. Even if, however, they be substantially similar to those in operation in the exchange at New York, and the contracts between Condon and Bignon were governed by the latter, this would not affect our opinion.

The reference to any such a set of rules can have no further effect than to incorporate them, by reference, into the agreements themselves. They certainly can have no greater force than similar express declarations, if actually embodied in the conventions. We have seen, however, that the declarations of such contracts cannot debar the courts from searching after the real intention of the parties, and determining the controversy accordingly. The betters in these cases might purposely draw their written contracts so as to cover delivery as well as a settlement of differences, and to regulate the former with all the elaboration that is found in these rules, and yet all the while the intention might be in fact to gamble.

If this mode of dealing be essentially in the nature of wagering, and if, as such, it be reprobated by law, it is hardly to be imagined that persons forming public rules for the government of the business would incorporate among their regulations a formal confession of the very illegality by which it was threatened. On the contrary, some attempt to hide away its illegitimacy should naturally be expected. To accomplish this latter purpose, the most convenient plan would be to frame such rules, and the contracts thereunder, so that the latter would possess at least the seeming of legality. The framers would naturally incorporate into their rules and forms, stipulations for delivery and payment of price, and others of a similar nature, which usually mark conventions that are of validity. Parties that merely contemplated gambling could, as they are doing every day, put up their bets upon the exchange; and consequently, under these rules, and certainly these regulations, could not alter the real nature of their dealings, any more than they could control absolutely the minds and wills of such contractants. The mere fact that the holder of such a simu-

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lated contract may subsequently determine to stand upon the letter of his convention, and demand or tender delivery, does not exclude the idea that, at the inception of the matter, both parties intended a simple settlement for differences without such delivery and without payment of price. The courts, upon the presentation of this issue of illegality, will not stop their investigations, any more for being in face of such rules, than if confronted by a written convention, which similarly reserves a right of which it is asserted both parties intended not to avail themselves. So, the circumstances would be appealed to for light, and those that we have already considered would be as potent against these rules as they could be against such a contract that was express and complete without reference. As the burden of proof can be shifted by circumstantial evidence in one case, so, likewise, may it be shifted in the other.

These formal rules do not reduce a particle the great volume of the future business, or add one bale to the actual crop. They do not do away with the fact that, despite their clauses, this vast business is conducted almost entirely upon settlements of differences, and with so few deliveries. They could not wipe away the history of the past transactions between Condon and Bignon in this case, or strike out one feature from the peculiarity of their relations towards each other and towards the contracts themselves.

It is contended, in this case, that Bignon was simply a broker, or agent, of Condon, and that, as such, he is entitled, under any circumstances, to reimbursement for what he has paid out for account of his principal. The laws of this State are express and emphatic in their condemnation of gaming. The constitution of 1879, art. 172, declares gambling to be a vice, and commands the legislature to pass laws for its suppression. We are not prepared, under any circumstances, to hold that any one who is fully cognizant of the nature of transactions of this nature, and hence knowingly brings them about, can escape being viewed as a participant in transactions which the law condemns, and appeal to the courts for the

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enforcement of his rights or interests in, or growing out of, such obnoxious dealings. However, we do not consider, from the evidence, that Bignon was the mere agent of Condon, making disbursements as such. He had a standing connection with the New York house, covering many dealings, and for many persons. He kept a general and running account of losses and gains with that house, and made stated settlements with them. That house had accounts with no one but Bignon, in connection with such matters; rendered accounts to him, drew upon him, and were drawn upon by him, according as the balance of their accounts varied one way or the other. On the other hand, Condon and Bignon, likewise, dealt with each other exclusively. From Bignon, and in the name of Bignon alone, Condon received all accounts; and between them it was that losses or gains were adjusted and paid, or settled by note, as the case might be.

Whilst it was, of course, necessary for Bignon to have some one in New York to act for him, who that representative was does not seem to have concerned Condon, who sought for, and dealt alone with Bignon. Under such circumstances, we cannot view the latter in any other light than as a contracting principal, at least so far as Condon was concerned, who was making use of B. R. Smith & Co., to transact business for him in New York, as a bank here, receiving foreign bills to collect, might send such bills to a foreign bank for presentation, etc.; or as a commission merchant here might consign his principal's cotton to Liverpool for sale, on that market, by his own correspondent.

The judge deciding this case below seems to have disposed of this case in accordance with the principles herein propounded, and his judgment is affirmed, with costs.

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CONCURRING OPINION.

ROGERS, J.—I deem it proper to refer to some extent to the evidence in this case, because the appellant urges two grounds in opposition to the claim of the appellee: because he acted

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as a broker or intermediary in the transaction; and because the note represents money paid by him for Condon's account.

"The broker or intermediary is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatory of both." C. C. 3016. "His engagement is double." C. C. 3017.

It appears from the testimony that the opponent, Bignon, had an account with a firm styled B. R. Smith & Co., New York; that Condon's name did not appear as a purchaser upon their books. All accounts were made out in the name of Bignon, who was a regular customer of this New York house, who looked to him for all losses, and shared with him one-third of their commissions. The relations of Bignon with the New York house are general, for instance, as testified to by one of the witnesses:

"We had constant settlements during that time. We, for instance, pay here in New Orleans, some parties' profit, and collect from others' losses, which, of course, makes a settlement. If the difference was against him, Mr. Bignon collected more than he paid out. He remitted by buying a bank check; otherwise he would draw upon them and sell his check to a bank here." \* \* "We make a prompt settlement to preserve our credit with the house in New York."

It is very clear that Bignon cannot be regarded as a broker in this transaction. If he bought from the house in New York, and, when instructed by Condon to purchase, bought from himself, he became a principal. *Beal v. McKiernan*, 6 La. 417.

If he acted as broker, and hence necessarily for both Condon and B. R. Smith & Co., he was not responsible to either party for the price or thing sold. C. C. 3018; *Buddecke v. Harris*, 20 La. An. 564; *Currey v. Hoover*, 10 La. An. 437.

It will be seen from the account furnished by Bignon, which my colleague has given at length, that the entire account is made up of *losses*, for which, *as the broker of Condon*, he was in no manner responsible. We must, therefore, regard him as a principal, and examine into the contract between him and Condon.

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Did Bignon sell Condon any cotton for future delivery? Testifies the witness: Question—"Do you know what those purchases and sales were?" Answer—"Yes." Q.—"What were they?" A.—"Well, they were purchases or sales (as they may be) of *future delivery contracts* under the New York Cotton Exchange." Q.—"Do you mean to say these were the number of actual bales bought in New York—actual, identical cotton?" A.—"No, it was the *purchase of a contract*."

From this testimony and that of others, it is clear that Condon advanced so many dollars in May, representing a certain value of so many bales cotton on that day, called "Septembers" or September delivery. There was no agreement other than what has already been referred to. It was not intended that either party should await the day of delivery, because no cotton was on hand; but the sum advanced by Condon was either too much or too little, as the daily market values might indicate. He might find himself either enriched or impoverished at any hour of the day; he could be called upon at any moment for more funds, or he might retire with a profit. So that we find him in December heavily in debt, on his May transactions; for a September delivery. Not a bale of cotton accounted for, and the whole affair predicated upon the purchase of a *future contract*, indicating purely and simply a difference of price, stipulated at the time of contract, and the market price at the future time named for delivery.

It is not my purpose to go beyond the merits of this case. The law regarding contracts for future delivery cannot be misunderstood. That they are valid and can be enforced when made *bona fide*, and with the essential requisites of all contracts of sale, no one doubts; and that it is equally proper to adjust an originally valid contract, by agreeing not to enforce a specific performance, but to pay a sum in damages or a difference, is also clear. But here we are told, not that cotton is sold or purchased, but a future contract, which represents nothing, is passed from hand to hand, and assumes no character, except such as the caprice of individuals may choose to give it.

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I have had my attention called to the case of Warren *v.* Meyer, Weis & Co., which I decided while occupying a seat on the district bench. I adhere entirely to the judgment therein rendered; but the facts of the case now before us are different. In that case, Warren claimed that he had deposited with Meyer, Weis & Co., *for safe-keeping*, one hundred and ninety-five dollars. It appeared on the trial that Meyer, Weis & Co. were not bankers, engaged in the business of receiving money on deposit for safe-keeping, but were cotton factors and commission merchants, doing business in this city and in New York; that they purchased, by order of Warren, *cotton* in New York, at a stipulated price, delivery in August, 1879; that Warren accepted the purchase, and deposited the money with them on that account; that in the following month, Warren ordered them to sell the *cotton*, which they did; that they had no pecuniary interest in the matter, except their commission, and in all of which they acted as agents. The testimony showed such facts, and the judgment was rendered in accordance.

In the case now before us there is no shadow of testimony to show a purchase of a single bale of cotton, or an intention to sell or buy on either part; for, be it remembered, that Bignon was operating in his own interest, with simply a credit with a New York firm, not for *cotton*, or an equivalent for cotton, but simply in the matter of *losses* or *profits* on *future contracts*.

This record presents no consideration which would warrant a dissent from the decree of the district court. I, therefore, concur in the decree rendered by my colleague.

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ON APPLICATION FOR REHEARING.

MCGLOIN, J.—The opinion of the honorable District Court for this Parish, Division C, rendered in the suit of Brittin & Bright *v.* Johnsen, has been cited, in support of an application for a rehearing. The high esteem in which we hold the learned judge who decided that case, has led us to consider

his opinion carefully, and to examine again most closely the questions involved. We may say that we consider that there is, in the main, no great difference in matters of law between the opinion in that cause and the one already given by us in this. Both agree that where the original and mutual intention of the parties is not to deliver and to pay the price, but merely to settle for differences, the conventions are aleatory and void ; that the question is one of fact, and that it is not dependent upon or concluded by the form or wording of the contract itself.

The proof in the case of *Brittin & Bright v. Johnsen* does not seem to have been in all respects similar to that which appears in this record. We do not propose to criticise the findings of our learned brother who decided that litigation upon the particular facts that were before him, as each transaction must be determined by its own circumstances. So far as our own opinion is concerned, as originally rendered, and as based upon the facts of this case, renewed examination and further reflection have but strengthened us in our convictions.

We held that the intent to gamble might be implied, and that it was susceptible of establishment by circumstantial evidence. It is a matter of most frequent occurrence that persons contracting, say or do nothing to express an intent which each has and knows the other to have, relative to matters of essence to their agreements. Thus, one man enters the place of another, and orders one or more barrels of flour sent to his own house or store. Both are silent as to price. The intention, however, that the transaction should be a sale, and to accept the market or usual price, exists, and will be inferred ; so, in the vast majority of purchases, there is nothing mentioned with regard to delivery or terms of payment ; yet it must be held that delivery, and that immediate, was contemplated, and payment as well—the latter according to usage. In this manner, illustrations might be indefinitely multiplied, but those given are sufficient.

Applying these principles to the case at bar, it is evident



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that parties dealing in futures may both have the intention of gaming, and such intention may be mutual, although no words expressive thereof are passed. In searching for the undisclosed intent, the court knows of no guide except the general rules of evidence, and can go forward in no manner differently from that in which it would proceed, were it a sale of flour, as above supposed, which was being investigated. The same circumstances and considerations which would be of force in the one case, must serve us in the other.

In the matter of the order for flour, the judge could usefully inquire into the nature of the original possessor's business, and, were the latter only recently established, proof as to the general character and usage of the particular trade in which such possessor had embarked, would be acceptable. So, in this case, we regarded the proof given, that dealing in futures had become an established and extended business, involving transactions by the thousand, and purporting to handle cotton by the millions of bales; that in the course of this business, settling by payment of differences, was the rule and usage, and delivery and payment matters relatively of rarest exception; that its dealings involved in one month many times more cotton than was in the entire crop of the year, and that it could not possibly be conducted upon the scale attained, were delivery and payment actually demanded in any great number of cases. The suggestion that each of these future contracts is assignable, and that they are frequently so assigned, and that, as each transfer is registered, the appearance is that much more cotton is sold than is actually so disposed of, cannot affect our judgment. In the first place, no proof of this circumstance is in the record of this case; and if it were, it would not do away with the fact that throughout each line of assignments, and at the actual end of the contract's life, there is almost, without exception, the intent to adjust by settlement of differences alone. The actual usage of this trade would not be touched, and the fact might also remain that the aggregate of contracts themselves, in connection with the spot business,

would remain far beyond the amount of cotton available in the market for delivery, or even far beyond the total itself of the entire crop.

In the matter of the flour, the court would admit proof of prior dealings between the parties and its character, showing that on previous occasions the defendant had given similar orders, and in every instance, without demur, had paid the grocer's bill, drawn up in accordance with the market price. So, in this case, we regarded and gave effect to the testimony, etc., showing that Condon and Bignon had had in the past, dealings similar to those under investigation, and that these antecedent transactions had been adjusted, invariably, and as a matter of course, by simple settlement of differences.

Stronger than all, however, if, in the case of the flour, without fresh conference, the receiver had sent and the deliverer accepted a promissory note, covering the value of the flour at current rates, could it be contended that this circumstance would not establish conclusively the original intent as determining the nature of the transaction? In the matter now under investigation, the dealings that serve as a basis for the note sued upon, being accompanied, at the moment of their birth, with no particular discussion as to delivery and payment of price, were disposed of *as a matter of course*, by simply charging differences, and this last without so much as a mention of delivery or payment. If the original intent were to deliver and pay, the natural outcome of each transaction, in default of subsequent modification, would be delivery and demand for the entire price. Any change in the original purpose would be the offspring of renewed negotiation, and such negotiation and its result would be made to appear. Here, however, instead of coming together for new arrangements, the pretending vendor sends upon printed and formal blanks to the pretending purchaser a mere account of differences, and this is received by the latter as the natural, proper and expected conclusion of the matter. Under such circumstances is the presumption not invincible, that the settlement was in

strict accordance with the original and mutual intent, harbored by each contractant, and each knowing at the time that expression was a matter of no necessity? Such a state of facts, even though disclosing itself in one particular case, goes far to strengthen the conclusion that the common, and almost universal usage in this cotton-future business is to settle solely upon differences; for, otherwise, how would the parties to this controversy have dispensed in the manner they have done, with any stipulation, original or subsequent, waiving delivery and payment? It shows that the usage was so general and so universally conceded and understood, that it sufficiently determined these questions, entering by implication into their contracts, and rendering express discussion and convention matters of supererogation.

Under such circumstances we can see no pertinence in the authorities which declare that a contract, originally lawful, may be finally adjusted by a mere payment of differences. To give such authorities applicability in face of such a settlement, it should appear that this subsequent understanding was in fact arrived at; and they can have no bearing upon a controversy wherein, as in this, there was in reality an entire absence of any such subsequent modification of the original convention.

Furthermore, the supposition that one tendering a sale of cotton-futures may come in contact with a person intending really to take the cotton, and pay therefor, cannot militate against this position. It may possibly be true, that where one of the parties to such a contract contemplates a strict and literal performance, the transaction is not void. In such event, when the time for performance arrives, such a *bona fide* purchaser calls for his cotton, and the features peculiar to this case do not and cannot arise. Such a controversy would be determined according to its own facts, but they would not be the facts that are disclosed in this record.

We adhere to the views originally expressed relative to the effect of the rules of the Cotton Exchange. They are not con-

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clusive, and we are not compelled to respect them as an impenetrable veil, which is to conceal successfully the gambling intent in every case. We are dealing with a system of business which, by the evidence in this case, seems, on the whole, to be essentially of a gaming character; and it would be an extraordinary exposition of judicial weakness were any formal and empty rules to serve as a complete protection, in favor of wholesale gambling, and against judicial scrutiny and condemnation.

Rehearing refused.

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*Court of Appeals, Fifth Circuit, Ascension Parish.*

SUCCESSION OF DONAT MONSON, on the Opposition of Widow  
APOLINE MONSON to Homologation of Administrator's  
Account.

1. A person suing under a special provision of the law, must bring himself within its terms.
2. To entitle a surety to contribution, as against his co-surety, it must appear that the former has satisfied the debt, in consequence of a law-suit instituted against him.
3. Until this is shown, the surety is without cause of action against his co-surety.

*Appeal from the Twenty-Second Judicial District Court, Parish  
of Ascension. Cheevers, Judge.*

*John H. Illsley* for opponent and appellee.

*Paul Lèche* for administrator and appellant.

*E. N. Pugh* for heirs and appellants.

BLAKE, J.—The sole question presented in this case is one of contribution between co-sureties.

It appears that the opponent in this case, together with Donat Monson, now deceased, obligated themselves, severally and *in solido*, on a tutorship bond. Subsequently a judgment, as against the surety, widow Apoline Monson, was recovered in an action on that bond. Apprehensive of a seizure under that judgment, she now opposes the administrator's account filed in

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the succession of her co-surety, Donat Monson, and asks that said account be so amended as to compel a contribution from said succession for half of the judgment obtained against her, and to be paid over to her.

The judgment of the district court is to the effect that said contribution and payment be made in conformity to the prayer of opponent's petition.

The objection urged by the administrator is that the opponent has not satisfied the judgment rendered against her, and that the theory of contribution is predicated on payment, which seems to be wanting in this instance.

Article 3058 (3027) of the La. Civil Code (the law governing this case) reads as follows: "When several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt has his remedy against the other sureties, in proportion to the share of each; but this remedy takes place only when such person has paid in consequence of a law-suit instituted against him."

Until this law is shown to have been complied with, the appellee is without cause of action. The language of the law seems plain and unambiguous.

In order to entitle a debtor to the right of contribution, as against his co-debtor or surety, he must have satisfied the original debt in consequence of a law-suit instituted against him, in which case there arises a subrogation in his favor against his co-surety for his share of the debt.

A person suing under a *special provision* of the law, must bring himself within its terms. For these reasons we are forced to the conclusion that the grounds of opposition are not well founded in law, and that the judgment maintaining the same is erroneous. Judgment reversed and opposition dismissed.

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Petit v. Cormier.

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*Court of Appeals, Third Circuit.*

MARY ANN PETIT, Wife, v. ELODIE CORMIER, Widow.

1. By the writ of injunction, parties may be compelled to do, as well as to refrain from doing.
2. Where a party in peaceful possession of real property has been violently dispossessed, the writ of injunction may be issued to the disturber, commanding him to restore possession.
3. The rule that one who relies upon possession alone, without title, must show possession by enclosures and exact measurements, applies only where the defendant in a possessory action sets up an *adverse possession*, based upon mere intrusion or usurpation. It does not apply as against a plaintiff who has been disturbed by one who does not set up in himself an adverse possession.

*Appeal from the Thirteenth Judicial District Court.**Hudspeth, Judge.**J. N. Ogden and A. Bailey for plaintiff, appellee.**Lewis Brother for defendant, appellant.*

Plaintiff, in peaceful possession during many years, of certain real property, was dispossessed by defendant, and brought this action for the recovery of possession, praying at the same time for an injunction restraining defendant from further disturbing her lawful possession, and commanding also said defendant to restore the property. The writ issued as prayed for, but defendant refused compliance. A rule was thereupon taken to compel obedience, and to this rule defendant answered, setting up title in the defendant's deceased husband, and possession by him up to the time of his death, in June, 1880; denying that plaintiff had had lawful possession during the twelve months immediately preceding the institution of this suit, and averring that the said plaintiff has never had possession otherwise than through and by the trespass of William Millsbaugh, who took possession thereof by stealth, when her (defendant's) husband's tenant, one Hewitt, vacated the premises. The court subsequently entered a decree in chambers, ordering defendant to relinquish possession, and later, on trial upon the merits, there was judgment in favor of plaintiff as prayed for. Defendant has appealed.

MOORE, J., after stating pleadings and facts—It is contended by the defendant, appellant, that the judgment should be reversed, plaintiff's suit dismissed and she be restored to the possession of the property. In brief, defendant's counsel contend that the writ of injunction will issue on the *ex parte* application of complainant, only in its remedial or prohibitory form—that is to say, when the purpose is to prohibit or restrain the performance of something; that in its mandatory form, when it commands something to be done, it cannot be issued until a hearing on the merits; and they cite, in support of this proposition, the case reported in 31 La. An. 497.

The next proposition is, that when an interlocutory order has been granted in error, and the order has been executed beyond recall, the appellate court, though it can give no adequate remedy, or practical relief, will annul the order at the costs of the plaintiff in injunction; and in support of this proposition we are referred to the case reported in 26 La. An. 603.

They also urge, that one who relies upon possession alone, and shows no title, must show possession by enclosures, by inches, and they refer us to 9 Martin La. 174; 19 La. 257.

So far as concerns the first proposition, we find that the rule established by the decision in 31 La. An. 497, cited by both parties, and also 7 Rob. La. 442, according to our understanding, is, that although the writ of injunction in its mandatory form cannot issue *ex parte*, and before trial of the merits, yet, when a party has been prohibited by injunction, in its remedial form, from obstructing the exercise of a right, such as the right of passage or way, the right of possession, etc., he may be commanded to remove the obstruction, because the continuance thereof effects the injury that he is prohibited or enjoined from doing.

In McDonough v. Calloway, 7 Rob. La. 442, and in Pierce v. City of New Orleans, 18 La. An. 242, it was decided, that parties may be compelled to do, as well as to refrain from doing, certain acts. We are of opinion, therefore, that the order of the

court *a qua*, granting the writ and effecting the removal of defendant from the premises in question, was not erroneous.

The second proposition of defendant's attorney we cannot sustain, for the reason that we do not think their first tenable.

As to the third proposition, "that one who relies upon possession alone, and shows no title, must show possession by enclosures, by inches," we find, on a careful reading of the authorities referred to, that the cases there decided were cases where the parties defendant in the possessory action had set up a possession *adverse* to that of plaintiff, and were mere intruders or usurpers; and the court was of opinion that the same rule that applied to the one applied to the other, and made no distinction between an intruder and a usurper. Had the defendant, in the case at bar, set up by way of defence to plaintiff's action, that she had possessed for more than one year, or for a sufficient length of time to have acquired the land by prescription, or the right of possession adversely to plaintiff, then perhaps these decisions would apply; but we do not think them applicable to this case. We are of opinion that the plaintiff has made her case certain by the evidence adduced on the trial.

As to the ruling of the court, admitting in evidence the inventory of the estate of J. H. Millspaugh, excepted to by plaintiff's attorney, we think the reasons given by the judge *a quo* for his ruling, good. The evidence was not admitted to show title, but to show possession alone. The objection went really to the effect of the evidence. In our opinion, it did not prove what it was admitted to prove, and it was in for no other purpose. The plaintiff had a right to invoke the remedy by injunction. *Vide* C. P. Art. 298, No. 5; 29 La. An. 795, and authorities already cited.

\* She was entitled to the action for possession of the property. She has shown that she possessed the property when she was disturbed, through her agent; that she had possessed it quietly and without interruption, as owner, for more than one year prior to her being disturbed, having, during the whole



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time, leased the property to her tenants, and collected the rent; that she had suffered a real disturbance, in fact, and that she brought her action within the year in which the disturbance took place. C. P. Arts. 46, 47, 49, 53.

Judgment affirmed, with costs.

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MRS. B. LORENZEN v. A. A. WOODS.

1. Where the true condition of rented premises can be readily observed at the time of leasing, the tenant cannot subsequently complain of a defect in the drainage.
2. The mere fear that, in the future, a tenant or his family may be affected injuriously by the defective drainage of rented premises, affords no ground for damage.
3. Where rented premises are in need of necessary repairs, the remedy of the tenant is to duly notify the landlord; and if the latter fails to make them, the tenant may then apply the rent due, so far as necessary, to such repairs.
4. In such case, where there is a lease, and the amount of the entire lease is sufficient, it makes no difference that only a month or two of the rent is actually due; the tenant has the security of the rent for the whole term.
5. Where the tenant has not so notified the landlord, and, if necessary, made the repairs himself, he cannot refuse to pay the rent as it falls due.
6. To ascertain what is really demanded by a litigant, the prayer of his petition or answer must be examined.
7. The sweeping prayer for *general relief* cannot be made to cover a relief which is primary and important.
8. A defendant advancing counter claims, either by way of reconvention or compensation, must comply with all that is required of an actual plaintiff.
9. In every case, the pleading must state clearly what is the thing demanded, leaving in ambiguity nothing that is material.
10. This court will enforce strictly the laws of the State relative to pleadings.
11. A city ordinance forbidding the erection of buildings upon lots until such lots have been inspected, and a certificate of proper grading has issued, cannot apply to houses erected before its passage.
12. The fact that houses, erected before the passage of such an ordinance,

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have not under them lots that have been graded and inspected in accordance with the provisions thereof, affords no reason to the tenant for refusing to pay the rent stipulated.

13. The ordinance of the city of New Orleans, authorizing the Board of Health to inspect and condemn premises which are in an unhealthy condition, authorizes said board to cause such premises to be vacated and closed, so to remain until properly cleansed or repaired. Such a law does not justify the tenant who has not had the premises condemned, and who has not vacated, to refuse the payment of rent.

*Appeal from Civil District Court, Division C. Houston, Judge.*

*Julius Aroni, W. F. Mellen* for appellant.

*J. Ad. Rozier & V. J. Rozier* for defendant.

ROGERS, J.—The plaintiff leased to defendant, for a period of three years from October 1, 1881, the premises on St. Charles street, in this city. Two months' rent was paid by defendant, when a dispute arose in regard to certain repairs and drainage work required, as alleged by defendant, to make the house ten-antable. The first notice is that given by defendant on December 5. On December 14th following the parties agreed to change the condition in the term of lease, reducing it from three years to one year. As appears, certain repairs were made by plaintiff. The rent due on January 1st, for the month of December, was not paid, and on the 7th of that month a suit was instituted for the full amount due on the contract of lease. On January 9 defendant again writes plaintiff that the repairs she had caused to be made had been improperly made; that the condition of the property required the necessary repairs previously specified, and that unless at once made defendant would make the repairs and deduct the amount from the rent.

Defendant has never made the repairs, has paid no rent, and still remains in the house. The only serious question raised is that of the defective drainage.

Defendant does not ask to have the lease annulled. *He intimates he has that right*, but contents himself with a prayer for damages.

The rented premises stands on pillars from three to four

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feet high, giving full ventilation, and affording every facility for obtaining a perfect view of the house and the condition of the ground underneath. If, as contended, the lot is much lower than the banquette, such a condition was, by mere examination, evident, and required not skill, but mere ordinary diligence, and an examination would have informed defendant of the true condition. On this point there can be no doubt; on other matters the conflict in the testimony justifies some doubt.

The defendant has suffered no damages—this the district judge found; and the mere fact that he anticipates the possibility of climatic or local disorders subsequently developing disease in himself and family, cannot warrant a judgment in his favor.

It would be an idle inquiry to enter into and discuss the theory of possible illness, in the presence of an admitted immediate healthful condition. No law would compel, neither would it warrant, a person in submitting himself or family to the perils of disease; but when he assumes the risk, and, as in this case, does nothing to remove himself from the threatening circumstances, the law cannot listen to his fears, nor award a relief for anticipated damage.

There is no doubt the rent is due—it is admitted; the necessary repairs claimed have not been made; not one dollar has been paid out by the tenant; nor is it shown he ever did more than obtain an estimate from a builder of what the repairs would cost.

The tenant is not without protection. He is authorized by law to make the repairs, if necessary ones, and deduct from his rent, in all cases when the landlord refuses to make them. And defendant in this case, while his monthly rental was only sixty dollars, held by a lease of which only two months had passed: he had ample security for the two hundred dollars, or so much thereof as was legal, estimated as the costs of needed repairs. C. C. 2694; *Lewis v. Pepin*, 33 La. An. 1422, and authorities there cited. To permit a party defendant to

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recover in a proceeding like the present, would virtually allow him to keep both premises and rent.

We have not reviewed the evidence in this case, in so far as it bears on the merits of the defendant's demand for repairs, whether necessary or not necessary. The pleadings present the pure question of law governing the relations of landlord and tenant. "Does a failure of the lessor to make necessary repairs, sustain a claim for damages by the lessee, when the rent is sufficient to enable the lessee to make them?" The answer must be in the negative, *because*, "the lessee is authorized to make them himself, and to deduct the cost from the rent."

Judgment reversed, and judgment is now rendered for plaintiff as prayed for, with costs of both courts.

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ON APPLICATION FOR REHEARING.

MCGLOIN, J.—Defendant, on application for rehearing, insists that there was error in our opinion first given herein, where it is declared that said defendant does not expressly pray for the annulment of the lease. Of course, to ascertain the nature of the relief which a litigant demands, we must examine the prayer, which concludes the principal pleading, be it a petition, or an answer.

If a defendant, either by way of reconvention or demand in compensation, assumes, on his part, the position of a plaintiff, he must comply with all that is required by the law of a plaintiff. C. P. Arts. 365, 328.

Where a petition is presented it must state clearly what is the nature of the demand, and leave in ambiguity nothing that is material. C. P. Arts. 171, 172, 173, 319.

The following is a brief, but full synopsis of the prayer of defendant in this case:

"Defendant prays for the rejection of plaintiff's demand, with costs, and that his own reconvention be maintained, and that Blanche Lorenzen be condemned to pay plaintiff in reconvention \$500 damages, and the further sum of \$120, rent

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Lorenzen v. Woods.

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already paid and which should be refunded, making a total of \$620, with interest from October 1st, 1881, until paid, and costs; and that in case said lease is not annulled by the judgment of the court, and the said plea in reconvention be not maintained, then that defendant be declared entitled to make the necessary repairs, etc., amounting to \$200, from the amount of rent, in case respondent should be condemned to pay any rent; and for further general relief, which the nature of the case may require."

Certainly there is here no formal and express prayer for the annulment of the lease, or any expression of a desire on the part of defendant that it should be so annulled. As for the sweeping prayer for general relief, we do not consider it consonant with due notice and fair pleading to permit a defendant to secure—or, perhaps, we might say, veil—under such a vague and sweeping clause, a relief which is primary and important. To do so, would be to declare that an answer need in no case specify the particular character of relief that is expected, and that the pleader may, in all cases, content himself with such a sweeping conclusion alone, and then stand prepared to shape his demand according to his pleasure and the exigencies of his case, as the same may develop upon the trial. It is evident, that if language so vague can cover a demand to annul a lease, it should equally well cover one for damages, or for any other affirmative relief which it is open to a defendant to claim, provided the necessary facts were alleged in the body of the answer, either directly or indirectly.

Nor does the body of the answer in this case do more than to declare, in this particular connection, that the alleged default of plaintiff (Mrs. Lorenzen) "*entitles* defendant to have said lease annulled and rescinded."

If, under such a state of affairs, we were to recognize the defendant as one demanding the nullity of a lease, we would certainly be casting wide the door to ambiguity in pleading, and consequent surprise and injustice. This we are not prepared to do. On the contrary, we will, as declared in *Alford, Bettis & Co. v. Hancock*, 1 McGloin, 280, "strictly enforce the laws of the State regulating pleadings."

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Lorenzen v. Woods.

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The defendant claims that the repairs and works necessary amount to \$200. Of these, independent of the damage, or filling, all that he claims does not exceed fifty dollars, according to the estimate of the architect, Carter, whom he caused to examine the premises, and tendered as a witness. At the time of the institution of this suit, one month's rent, \$60, was actually due, a sum sufficient to meet the expense of repairs to the house proper; and as to such repairs, the question does not arise whether a tenant can be held to make repairs in amount beyond what is actually due at the moment such repairs become necessary.

With regard to the drainage, we do not see how the alleged defect can be held to have been hidden. Many witnesses testified *pro* and *con* upon this issue, and they all seem to have been able to examine without great difficulty. They did not have to rip up or tear away in order to see the condition of things under the house, which stood upon piers, three or four feet above the ground. Indeed, the witness Rondeau, an employee in the city surveyor's office, and a witness of defendant, goes so far as to declare that nobody that was not blind, could help seeing the depression in the ground just under the house.

If the general level of the yard or under the house was a material matter, and it was open to inspection, defendant, in making his lease, should not have omitted to examine it; and having failed to do so, he cannot complain after the execution of his contract. He rented the house as it was, and it is to be presumed that the rent was fixed in view of all the circumstances; and to permit him to demand an extensive change in the grade of the lot or lots, would be to allow him, without an increase of rent, to receive something better than that what his lessor had agreed to deliver.

The city ordinance No. 6022, sec. 12, to which defendant refers, can have no bearing upon this case. That section is as follows:

"No lot shall be used for building purposes in the city of New Orleans, until the same shall have been inspected by the

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Lorenzen v. Woods.

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city surveyor, who shall give a certificate that such lot is filled above the level of the banquette, and graded so as to be effectually drained into the street gutters; and upon such certificate all owners, agents, contractors and builders are required to obtain permits from the Board of Health before commencing the erection of any buildings."

This ordinance clearly relates only to buildings that are to be erected after its enactment; and as it bears official date only June 5th, 1879, long after the erection of the house leased to defendant, it can have no application. Before the adoption of this ordinance, thousands of houses were erected, which, of course, could not have been built in compliance with a municipal law not in existence, and the fact that in their building such law was not considered, is no reason for non-payment of the rents of such premises, and no reason why a tenant should enjoy a house, etc., that was better than the one for which he had contracted.

The section of the ordinance cited, which applies to the house occupied by defendant, and to other houses built before 1879, is evidently section 13, which authorizes the Board of Health, in its discretion, and for the protection of life and health, to declare any structure unhealthy and order it to be at once vacated and closed; and forbidding premises so treated from being again occupied until they have been cleansed or repaired so as to be fit for human habitation.

Had the defendant considered the premises he occupies unhealthy, notwithstanding the fact that they were so when rented, he might and should have applied to the Board of Health for its intervention under the powers thus conferred; and, of course, so long as he was absent from said property he could not be held for rent; or, if the Board of Health simply declared the place unhealthy, without ordering its vacation, there might be ground for the complaint now urged. It appears, however, that the proper sanitary inspector of said Board of Health, and, as such its, lawful agent and representative, did examine said premises, and find them suitable, with

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Taylor v. Frederick et als.

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only one objection, which, on his recommendation, was remedied as he directed. Said inspector has so certified, and so sworn as a witness, and we give weight to his finding, which is that of the Board of Health.

We do not consider, so far as the municipal law has been shown to us in this case, that houses erected before 1879, must be in all respects conformable to section 12 of said ordinance. Such houses and premises, to be affected, must be in fact unhealthy, and be so found by the Board of Health; and this condition of unhealthfulness must exist intrinsically, and is not to be determined by reference to any arbitrary and universal law or regulation.

It is therefore evident, that defendant has shown no right to damages against the plaintiff, and that our ruling as originally given is correct. Nor do we consider him entitled to any return of rents paid, nor to any deduction from the rent actually due. The law (C. C. Art. 2694) authorizes the tenant to deduct sums he *has paid out* for necessary repairs, after due notice to the lessor, and not sums which he expects to so disburse. If a tenant, having a sufficient sum, out of the rent, in his hands to make necessary repairs, through error, fear or other motive, fails to cause them to be actually made, he cannot seek relief under the article quoted, for it is not applicable to his case, as he has chosen to present it.

The application for a rehearing in this case is therefore refused.

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*Court of Appeals, Third Circuit, Parish of St. Martin.*

JEROME TAYLOR v. TELESPORE FREDERICK ET ALS.

1. A demand for damages, clearly fictitious, will not be considered in determining the question of appellate jurisdiction.
2. The costs of an action follow the judgment, and a demand for such costs in the way of damages will not affect the question of jurisdiction.
3. Where the allegations setting out such claim for damages are too vague to justify proof, the demand will be considered fictitious.



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Taylor v. Frederick et als.

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4. The same, where no effort has been made below to establish the demand.
5. Where timber was cut by a trespasser from lands forfeited to the State for taxes, and subsequently said lands are sold by the tax-collector, the purchaser acquires no right to demand restitution from such trespasser.
6. The tax-collector, even had he attempted so to do, would have been without authority to subrogate such a purchaser to the rights of the State against such trespasser.

*Appeal from the Twenty-First Judicial District Court, Parish of St. Martin. Fontelieu, Judge.*

*Mouton & Martin* for plaintiff.

*A. & R. DeBlanc* for defendants, appellants.

Plaintiff, claiming to be owner of certain lands, alleges that defendants have unlawfully cut and removed therefrom two hundred and eighty trees, worth three dollars each, or in all eight hundred and forty dollars. He declares also that defendants are indebted to him in the sum of two hundred dollars damages for expenses forced upon him, such as costs, attorney's fees, etc. He prays that the trees in question be adjudged to be his property, and that defendants be condemned to pay him damages in said amount of two hundred dollars. Defendants plead the general denial, and particularly put at issue the plaintiff's alleged title to the lands in question. The judgment below was in favor of plaintiff, and defendants have appealed.

IRION, J., after stating the pleadings and facts.—The appellee has filed a motion to dismiss the appeal on the ground that this court is without jurisdiction *ratione materiæ*, the claims being for the logs, valued at eight hundred and forty dollars, and for two hundred dollars damages, making in all one thousand and forty dollars.

If the claim for two hundred dollars damages were a serious and *bona fide* demand, this court would be without jurisdiction, and the motion to dismiss would prevail; but we are satisfied that it is not a real demand, and that the only matter in dispute is the logs, valued at eight hundred and forty dollars. The plaintiff bases this claim for damages upon the expenses

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Taylor v. Frederick et al.

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forced upon him by this suit, such as costs of court, attorney's fees, etc. Without some statement of the amount claimed under each of these allegations, or some evidence to show what they are, it would be impossible for the court to pass upon them at all. The costs of court necessarily follow the judgment, and any claim for them in the body of the petition, as an item upon which the suit is founded, must be considered as a fictitious demand. No evidence was offered in the lower court to sustain the claim for damages. That claim does not appear from the record to have been urged before that tribunal, or to have been considered in rendering the judgment. As a further evidence that the plaintiff was not serious in making such a demand, he has filed no answer to the appeal setting up error in the judgment, though that judgment ignored the demand for damages; nor has he pressed that portion of his claim in this court, except as an allegation in his petition upon which he bases his motion to dismiss. In *Pritchard v. Parker*, 21 La. An. 745, it was held that an allegation of damages, unsupported by evidence on trial in the court below, would not be considered in estimating the amount in controversy necessary to give the appellate court jurisdiction. This doctrine has been so often affirmed by the Supreme Court that we think it is no longer open for discussion. As already stated, we are satisfied from the record that the logs are the only matter in dispute between the parties, and the motion to dismiss must therefore be overruled.

On the merits several questions as to the validity of plaintiff's title are presented, and quite a number of bills of exception to the rulings of the judge *a quo* were taken, but the conclusions reached by us dispense us from the necessity of considering that branch of the case.

The evidence adduced by the plaintiff himself shows that the title set up by him was made by Gilbeau, collector, on the 2d of April, 1881, and the trees sued for were cut and removed from the land in the spring of 1880. At the time, therefore, that the alleged trespass was committed the plaintiff had no

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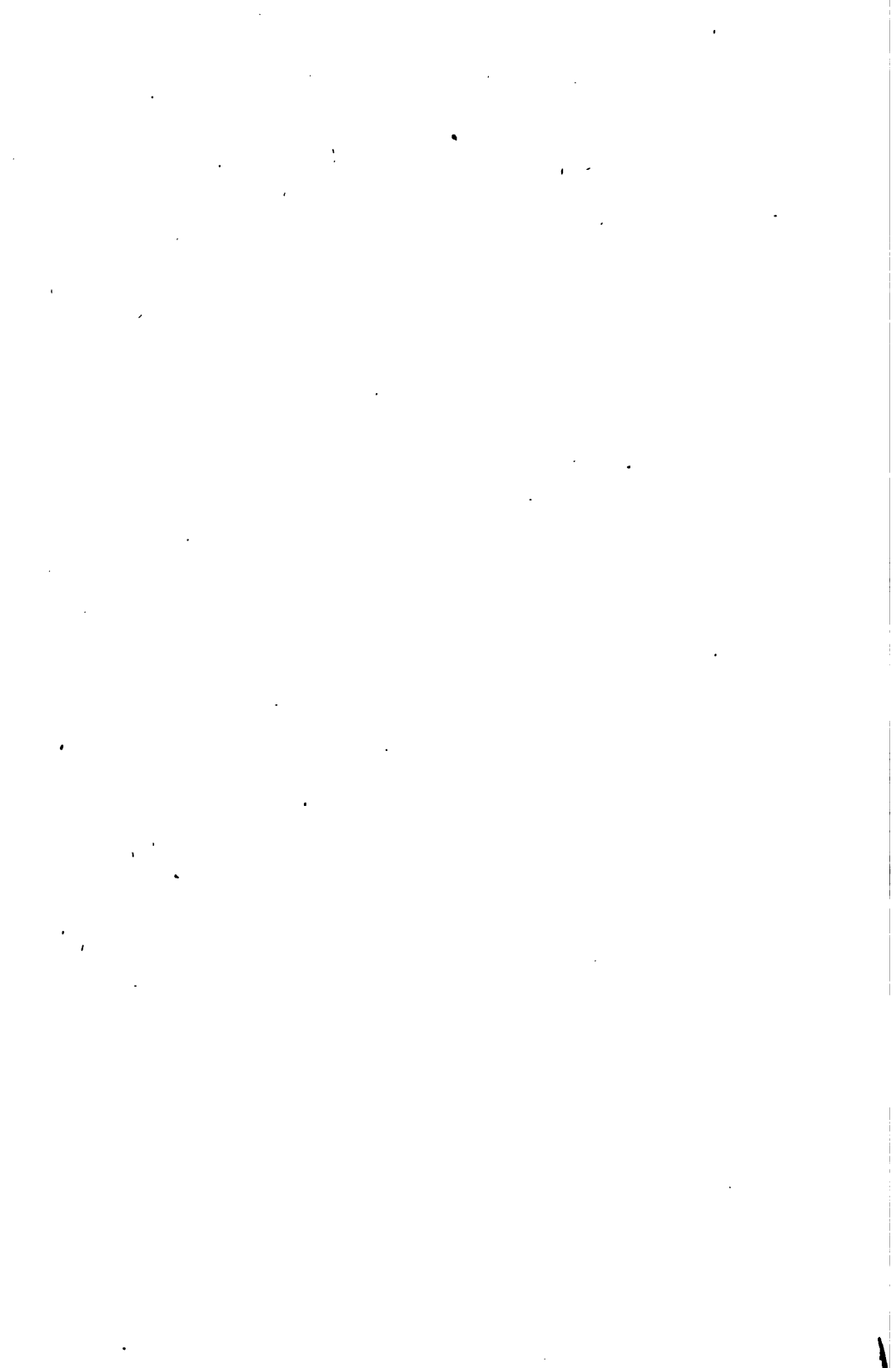
Taylor v. Frederick et als.

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shadow of right or title to the trees in question; and his subsequent purchase from the collector, even if valid, only gave him the land as it was at the time of his alleged purchase. There is in the deed of the collector no subrogation to the rights of the State, which existed prior to the deed itself, and if there were the collector was without any authority in law to incorporate such a clause in his deed. It is clear to us that the plaintiff has totally failed to make out any case against the defendants, and that he is not entitled to a judgment.

The intervenor has not appealed from the judgment of the lower court, even if he could be considered as an appellee. He has filed no appearance in this court asking for a change in the judgment, which makes no mention of his claim. He is therefore not before us at all, and we cannot consider the points presented by him.

Judgment reversed ; plaintiff's demand rejected.



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# INDEX.

ACTIONS. See Pleading.

## AGENCY.

1. Where a party conducts a business, for which the services of a superintendent or manager are essential, and does not himself act as such manager or superintendent, there is a representation that the parties actually performing such essential duties are his agents, with necessary powers. *Lochte & Cordes v. Gélé, 52.*
2. Where exclusive credit is given to the agent of a disclosed principal, the latter cannot be held. *Ib.*
3. The manner of charging upon the creditors' books affords *prima facie* evidence as to the placing of the credit. *Ib.*
4. The authority of an agent to draw against the proceeds of a claim or judgment belonging to the principal, but in the hands of an attorney-at-law, must be express and special. *Agnel v. Ellis, 57.*
5. A mandate conceived in general terms confers only a power of administration. *Ib.*
6. Powers of attorney, however general in terms, will be restricted in their application to the principal business of the grantor, and they will not be held to cover particular and exceptional acts, not necessarily connected with such business. *Ib.*
7. The terms *factor* and *commission merchant* are synonyms. *Delaume Bros. v. Agar & Lelong, 97.*
8. Definition of the term *factor*. *Ib.*
9. One dealing with a factor may be sued by the principal; but, ordinarily, the former may, in such a suit, avail himself of all the defences which would have been open to him had the demand been made in the name of the factor. *Ib.*
10. A broker may establish by parol an agreement fixing his rate of compensation for selling real estate. *Honston v. Boagni, 164.*
11. Where the owner of real property agrees to pay a certain sum to a broker for securing a purchaser, the compensation of the broker is earned so soon as the purchaser is secured. *Ib.*
12. The non-payment of a State license by the broker, does not prevent him from recovering what is due him for services rendered. *Ib.*
13. A bank taking paper for collection is, as to it, the agent of the depositor, who may at any moment revoke the agency and reclaim the deposit. *La. Ice Co. v. State Nat. Bank, 181.*
14. Even where the bank has permitted the depositor to draw against such deposit, this does not destroy the agency and divest such depositor of his title. *Ib.*
15. The application by a principal for an injunction restraining the agent from further acting under the power, is a revocation of the procurement. *Ib.*
16. All who are informed of the issuance of such an injunction are charged with knowledge of such revocation. *Ib.*
17. An employer continuing an employee in his service, after learning of negligence or misconduct on the part of the latter, is estopped from subsequently complaining. *Marshal v. Sims, Billups & Co., 223.*
18. For Appeals by Fiduciaries, see Appeal, No. 10.  
Attorney at Law, No. 1.  
Common Alley, No. 3.  
Futures.

## APPEAL.

1. Pending suspensive appeal, the inferior court can do nothing to impair the rights of appellant as secured by the appeal.  
*State ex rel. v. City of New Orleans, 1.*

2. As a general rule, a cause appealable to one party is appealable as to other. Carroll v. Wallace, 9.
3. No appeal lies from judgment *dismissing* a rule to take answers to interrogatories *pro confesso*. Ib.
4. Where, however, the judgment is upon a *traverse*, an appeal lies. Ib.
5. If, by admission of evidence without objection, a rule to take *pro confesso* is transformed into a virtual *traverse*, an appeal lies from the judgment. Ib.
6. Where an unqualified judgment *pro confesso* is rendered upon admissions in the answer that are only conditional, an appeal lies. State ex rel. v. Judge. 11.
7. A controversy originally appealable cannot be deprived of this characteristic by an improper division, and the rendition therein of partial and separate judgments. Ib.
8. In cases doubtful, appellate courts will not readily disturb the finding of the lower court. Denegre v. Bayley, 51.  
Dreyfus v. Lincoln, 313.  
Nagel v. Madere, 325.
9. Damages in case of frivolous appeals. Grabfelder & Co. v. Navra, 63.
10. Parties appealing in fiduciary capacities, must establish their authority, if not already of record, when application for appeal is made. Azemard v. Campo, 64.
11. Where it is made to appear that the certificate of the clerk is untrue and the record deficient, *certiorari* will issue to ascertain what evidence, if any, was tendered. Ib.
12. This court cannot pass upon a cause without having all the evidence and pleadings which were before the lower court; and where these are not brought up, the appeal will be dismissed. Ib.
13. It is the duty of the appellant to furnish a full and correct transcript, or record, with proper certificates. Becker v. Quick & Ahrens. 111.  
Becker v. Quick & Ahrens, 111.  
Sewell, Agent, v. Jacobs, 133.  
Grivot v. Waples. 191.
14. If a defect in the record be attributable to the fault of appellant, and no timely effort is made to remedy, the appeal will be dismissed. Ib.
15. If, however, the incompleteness of the transcript is not due to inadvertence, amounting to gross negligence, upon application at the time of or before argument, this court will allow time to remedy the defect. C. P. 898. Ib.
16. The court, in such a case, may dismiss *ex propria motu*. Grivot v. Waples, 191.
17. A mere reference in the record to the transcript in some other cause, does not make such transcript a part of the record. Ib.
18. A party profiting by his appeal is entitled to the costs thereof. C. P. 908. Dewar v. Bieme & Co., 75.
19. Where, on application for rehearing, an unimportant change is made, such as in the matter of distributing costs, the case need not be set again for argument and hearing. Ib.
20. A defendant who has not appealed from the decree dismissing his reconvention cannot, in his answer to plaintiff's appeal from the judgment upon the principal demand, ask for a review of the finding upon such reconvention. Keen v. Carlisle. 78.
21. Where damages are demanded for a nuisance, and the suit involves no question of ownership, the amount claimed in damages determines the jurisdiction. Ib.
22. An appeal from an alleged order authorizing the bonding of an injunction will be dismissed, where no such order appears of record. Barthe v. New Orleans, 80.
23. In such a case, the appearance simply of a motion to bond, without any evidence of the granting thereof by the judge, is not sufficient. Ib.

24. The constitution of 1879 did not make appealable, causes involving less than five hundred dollars, rendered and becoming final before August 1st, 1880. Rogers v. Goldthwaite, 127.
25. This court will follow the established jurisprudence of the State, as determined by the Supreme Court. Ib.
26. A party who in his brief makes a statement setting forth an agreement restricting the questions in a cause to certain defined issues, will be bound thereby. Favrot v. Bates, 130.
27. Questions of fact cannot be assigned as error in an appeal on questions of law alone. Smith v. Barkmeyer, 139.
28. In a suit coming up on questions of law alone, and which isto annul a judgment, the jurisdiction of the court originally rendering such judgment cannot be inquired into by this court, where no such issue was presented below. Ib.  
Page v. Caetano, 250.
29. In cases involving less than five hundred dollars, the judge *a quo* determines finally the facts. Page v. Caetano, 250.
30. In such a case the lower judge cannot be compelled to order the testimony to be taken in writing. Ib.
31. The facts in such cases may be brought to the notice of this court by statement of facts prepared in accordance with C. P., arts. 602, 603. Ib.
32. The reasons for judgment of the judge *a quo* cannot take the place of a statement of facts. Ib.
33. In a proper case the uncontradicted affidavit of appellant may be considered for the purpose of establishing an appealable interest. Worman v. Miller, 158.
34. Where a cause, originally beyond the cognizance of this court, has, by supplemental pleading, been altered in its character, and over the new issues this court has jurisdiction, it will review the judgment. Martel v. Smith, 167.
35. Where a party has been compelled in defence of a rule to litigate matters which should have been the subject of an ordinary suit, and the judgment is or should be for him, this court will not remand or dismiss because of the fault in pleading, but will, in the interest of the party aggrieved, settle the controversy finally. Harrison v. Godbold, 178.
36. No appeal lies from an interlocutory judgment or decree operating no irreparable injury. Bessinger v. Dupré, 202.
37. Where the members of a beneficial society not incorporated are plaintiffs, the heirs of suing members, who have died pending the appeal, need not be made parties. Sociedad, etc., v. Ducorro, 218.
38. Where a firm and its members are sued and condemned *in solido*, the appeal of the firm brings up the entire case, and avails the members. Marshal v. Sims, Billups & Co., 223.
39. Parties sued as members of a firm may use the firm name in appealing, and the court will not pass beyond the pleadings to find by the evidence that the firm was in fact dissolved. Ib.
40. All the members of a dissolved firm may unite in using the name of the firm in the execution of an appeal bond. Ib.
41. Want of necessary parties noticed *ex propria motu*. Flagg v. Roberts, 238.
42. Where garnishee denies property or indebtedness, the amount of the judgment against the original defendant fixes appellate jurisdiction. Handlin v. Burnett, 244.  
Carroll v. Wallace, 316.
43. The delay of three days allowed by Supreme Court for application for rehearing in cases outside of New Orleans, is not obligatory on courts of appeal. Brooks v. Dollard, 279.
44. Non insertion of words, "devolutive appeal," not fatal to bond for such appeal. Broussard v. Babin, Guidry & Co., 246.
45. In a suit against an *ordinary* partnership, the amount of the *entire debt* determines jurisdiction, and not the share of each separate partner Ib.

46. Prescription being plead for the first time in the appellate court, the cause will be remanded, if necessary, at request of plaintiff, for proof of interruption. *Ib.*
  47. This court cannot disturb a judgment as between appellees. *Pitard v. Carey*, 289.
  48. Where the State, sued and condemned in the court below, has not appealed, this court cannot disturb the judgment as to it, even *though* it be the sovereign. *Ib.*
  49. Where this court is satisfied upon one, out of two or more issues in a case, it may dispose of such issue, while remanding the other or others. *Laviosa v. Railroad Co.*, 299.
  50. In case of an appeal from an order fixing the fee of a curator *ad hoc*, held: By Rogers, J.—Appellate jurisdiction depends upon the amount of the fee accorded. By McGloin, J.—The amount involved in the principal suit governs. *Wood v. Howard*, 310.
  51. Where, as to jurisdiction, this court is divided in opinion, the appeal stands. *Ib.*
  52. The fixing by the judge *a quo* of a wrong day of return, is not a fault imputable to appellants; nor is the case affected by the fact that the motion for appeal is in the handwriting of appellants' counsel, and the erroneous return day is suggested in such motion. *Hemphill, Hamlin & Co. v. Braun*, 326.
  53. Where the bond is for the amount fixed by the court, the appeal will not be dismissed, even if filed too late for a suspensive appeal. *Ib.*
  54. Where there is no written motion filed, asking an amendment of the judgment appealed from, this court will not entertain an application made in counsel's brief for such amendment. *Fossier v. R. R. Co.*, 349.
  55. A fictitious demand will not be considered in determining the question of appellate jurisdiction; and where the allegations are too vague to justify proof, or where no proof has been adduced to support them, the demand will be considered fictitious. *Taylor v. Frederick*, 380.
- See Costs, Nos. 2, 3.  
 Attorney at Law.  
 Judgment, No. 22.  
 Jurisdiction, Nos. 5, 7.  
 Pleading, Nos. 35, 36, 37.

#### ARBITRATION.

1. An agreement to arbitrate is binding; and either party thereto, appealing to the courts, before submitting to or tendering arbitration, will be dismissed. *Alford v. Tiblier*, 151.
2. This objection, however, if not plead specially and in time, will be considered waived. *Ib.*

#### ATTACHMENTS.

1. In cases of attachment the debtor's property can only be reached by actual seizure, or by proceedings in garnishment. *McGloin, J.—doubting.* *S. W. Furniture Co. v. Manning*, 305.
2. Plaintiff in attachment cannot proceed against garnishee before final judgment against defendant. *McGloin, J.—doubting.* *Carroll v. Wallace*, 316.

See Insolvency, No. 7.  
 Prescription, No. 8.

#### ATTORNEY-AT-LAW.

1. It is the *principal* and not the attorney who is chargeable with the knowledge of the history of a cause; and the fault or negligence of such principal is not excused by the fact that his counsel were not participants therein. *Sewell v. Jacobs*, 133.
- See Bills and Notes, No. 4.  
 Judgments, No. 17.  
 Pleading, Nos. 12, 16.

**BANKS—BANKRUPTCY.**

1. The certification of a check is equivalent to the acceptance of a bill—the check standing on the same footing as an accepted bill.  
La. Ice Co. v. State Nat. Bank, 181.
2. The certifying bank may be sued by any holder of such a check. *Ib.*
3. Checks, bills, etc., placed with a bank for collection, do not ordinarily become the property of the bank, but remain that of the depositor. *Ib.*
4. This is so, even though the bank has permitted the depositor to draw against such checks. *Ib.*
5. The depositor of such paper may at any time revoke the agency and reclaim the deposit. *Ib.*
6. Depositors are not bound by Clearing House rules. *Ib.*
7. U. S. Revised Statutes, section 5223, does not make the property of third persons found at time of failure in the possession of a national bank, under contracts other than special deposit, liable for the debts of such bank.  
Delaume Bros. v. Agar & Lelong, 97.
8. The regularity of proceedings in bankruptcy, when made the basis of an action in a State court, may be inquired into in such court.  
Thompson v. Lemelle, 245.
9. Mortgages bearing upon property surrendered in bankruptcy cannot be cancelled, and the property sold unincumbered, without notice to the mortgagee duly served. *Ib.*
10. Without such previous notice, the order cancelling mortgages and ordering a sale free of incumbrances is void. *Ib.*
11. The recitation of the order, in such a case, that there was due notice, constitutes only *prima facie* evidence. *Ib.*  
See Judgments, No. 7.  
Prescription, No. 5.

**BILLS AND NOTES.**

1. The acceptor of a commercial draft or bill of exchange guarantees the signature and the right of the drawer to draw the same.  
Agnel v. Ellis, 57.
2. In innocent hands this guarantee extends to the question of an agent's authority, where the bill is drawn by an agent; but it does not protect him who originally received the bill, and was chargeable with the duty of making inquiry. *Ib.*
3. It is only where he holds commercial paper; that an assignee may have rights greater than his assignor. In other cases, fraud, error or other defence may be set up against all persons. *Ib.*  
Carroll v. Peters, 95.
4. An order on an attorney to pay out of the proceeds of a pending suit, is not commercial paper of any kind. It is not payable in any event. *Ib.*
5. The declaration of consideration upon the face of a note is *prima facie* evidence of the fact. *Ib.*  
Carroll v. Peters, 88.
6. Evidence, however, casting suspicion upon the bill, destroys the presumption arising from such declaration, and shifts the burden of proof. *Ib.*
7. The impeaching circumstances need not be strong in order to thus shift the burden of proof. *Ib.*
8. The mere fact that the bill is accommodation paper, is not of itself sufficient to shift the burden. *Ib.*
9. Where the burden is shifted the holder of the paper is bound fully to disclose his title and establish it clearly; he must give dates and all particulars. *Ib.*
10. In face of close and searching questions, mere vague declarations of good faith and valid consideration are not sufficient. *Ib.*
11. The inability or unwillingness of a holder to state the facts connected with his acquisition is of itself a suspicious circumstance. *Ib.*
12. One sued upon his own promissory note cannot impeach the title of the holder, until he has shown his interest in such an issue. *Ib.*

13. Where accommodation paper is not negotiated until after maturity, the party lending his name cannot be held. *Ib.*
14. Sureties to a lease, who have endorsed corresponding rent notes, are liable thereon without protest or notice. *Variol v. Doherty*, 118.
15. For title in case of deposits of commercial paper with banks for collection, see Banks, Bankruptcy, Nos. 3, 4, 5, 7.
16. For liability of banks certifying checks and the rights of holders of such checks, see Banks, Bankruptcy, Nos. 1, 2.
17. A notary unable, after proper inquiry, to ascertain the address of the drawer, may direct the notice of protest to him at the place where the draft was drawn. *Page & Moran v. Valery*, 208.
18. Interest beyond five per cent. cannot be recovered where there is no written agreement to pay more. *Ib.*
19. A note, whereof the sole consideration is usurious interest upon some other contract, is void. C. C. 2924 does not apply. *Dumas v. Boulon*, 274.

See Pleading, Nos. 10, 20, 21.

#### BOARD OF HEALTH.

1. Act No. 20, of 1877, extended the duties and increased the power of the Board of Health; it did not impair the act of March 15th, 1855. *Rice v. Board of Health*, 27.

See Landlord and Tenant, Nos. 9, 10, 11.

#### BONDS, JUDICIAL AND CONVENTIONAL.

1. Judicial bonds (injunction bonds included) are construed with reference to the laws under which they are taken. *Walters v. Faulk*, 236.  
*Broussard v. Babin, Guidry & Co.*, 286.

See Taxation, Nos. 10, 11.  
Warrants.

**BROKER.** See Agency, Nos. 10, 11, 12.  
Evidence, No. 5.  
Futures.

**CARD RATES.** See Obligations, Nos. 2, 3, 4.

**CERTIORARI.** See Appeal, No. 11.

#### COMMON ALLEY.

1. Where parties purchase from a common vendor, who had laid out in the rear an alley common to them all, but their titles run back only to the line of such alley, held: the vendees have nothing beyond the mere right of use in such alley. *Bourke v. Perry*, 66.
2. A mutual agreement, whereby all of such vendees discontinue the use of such alley, does not vest in the contractants the title to the ground itself. The parties to such an agreement will not, however, be heard attempting to impeach it. *Ib.*
3. The authority of an agent appearing in the execution of such a contract, may be inferred from the use subsequently made of a portion of the alley, as the share of the lot so represented. *Ib.*
4. He who has acquired from one of the original lot-owners, after the discontinuance of the alley, and who has taken and used as part of his purchase a portion of the alley, is estopped from subsequently demanding its reopening. *Ib.*

#### COMMON CARRIERS—COLLISIONS.

1. Tow-boats are common carriers. *Wood & Bros. v. Harbor Protection Co.*, 121.
2. In an action for damages against such boats the burden of proof is upon the carrier. *Ib.*
3. In defence of an action for damages resulting from negligence, the pilot or manager will not be permitted to show that he was ignorant of the difficulties attendant upon the service he has undertaken to perform. *Ib.*

4. In case of collision between a vessel moored and one in motion, the presumption is against the latter. *Ib.*
5. Where the means or precautions usual in the management of a boat are dispensed with, there is an assumption of responsibility for the consequences. *Ib.*

COMMON WALLS. See Walls.

COMPENSATION. See Agency, No. 9.  
Judgment, No. 19.  
Pleading, Nos. 8, 9, 19, 48.

CONFESSIONS. See Appeal, Nos. 6, 7.

# CONSTITUTION.

1. The act conferring upon the city of New Orleans the authority to govern and police the private markets of that city, is not in conflict with art. 235 of the constitution of Louisiana, which guarantees the equal rights of men. *Lamarque v. New Orleans*, 28.
2. Article 243, constitution of Louisiana, refers to the slaughtering of animals for human food, and not to the exposure of the products thereof for sale. *Ib.*
3. The public markets of New Orleans are not monopolies, within the intendment of article 258 of the constitution of this State. *Ib.*
4. The title of act No. 100, of 1878, is comprehensive, and sufficiently suggests the subject-matter. *Ib.*
5. The general rules of interpretation are applicable to constitutions. *Rogers v. Goldthwaite*, 127.
6. Sections 176, 179, 181, 183, 186, *et seq.*, Revised Statutes of Louisiana, as to class of claims coming within the purview of art. 1. miscellaneous ordinances, constitution of Louisiana, are abrogated by the latter. *State ex rel. etc., v. Jumel, Auditor*, 144.
7. That constitutional provision preserves only such claims as are evidenced by auditor's warrants, and restricts the uncollected revenues for the years named to the satisfaction of such demands. *Ib.*
8. And even such warrants, to be effective, must be examined and approved by the Auditor, Treasurer and Attorney-General. *Ib.*
9. Even after such final approval, such warrants are not to be paid directly, but are to be either paid in for back taxes or funded into Baby Bonds. *Ib.*
10. The constitution of 1868 restricted the debts of each year to the revenues thereof. The State, therefore, owed no more than to apply faithfully such revenues to such claims so far as they might go. *Ib.*
11. Article 1, miscellaneous ordinances, constitution of 1879, was a scheme for the fair distribution of the revenues of former years. *Ib.*
12. Where a law is not *ex post facto*, does not divest vested rights or impair the obligation of a contract, or otherwise violate the constitution, it may be retroactive. *Dours v. Cazentre*, 251.

# COSTS.

1. Where, in a former litigation, a party has had judgment for his costs, he cannot sue again for such costs. *Levy v. Flash, Lewis & Co.*, 124.
  2. Costs follow the judgment. *Taylor v. Frederick*, 380.
  3. Therefore, where, in a suit for damages, plaintiff includes in the claim the costs of such action, this demand is in the nature of one fictitious, and will not affect the jurisdiction. *Ib.*
- See Appeal, Nos. 18, 19.  
Juries, Jury Trial, Nos. 1, 2, 3.

COURTS. See Judgments, Jurisdiction.  
Appeal, Nos. 22, 23.  
Evidence, Nos. 1, 11, 12, 13.

COMMUNITY, LEGAL. See Husband and Wife.

## DAMAGES.

1. Damages resulting from a failure to comply with the conditions of a lease are due *ex contractu*, and they are prescriptible accordingly.  
Bourdette v. Board of School Directors, 4.
2. In a suit for damages against a sheriff for negligently releasing a seizure, the measure of damages, *prima facie*, is the amount of the writ, where the value of the property equals, or exceeds such amount; otherwise the value of the property fixes the extent of liability.  
Montegut v. Waggaman, 69.
3. A plaintiff in such a case, having shown the loss of recourse against the property, and the value thereof, the burden falls upon the officer to justify or legally excuse his conduct. *Ib.*
4. Where, however, even after such a release, there remained under seizure sufficient to satisfy the writ, which remaining property plaintiff himself released, he cannot hold the sheriff. It is a case of contribution. *Ib.*
5. A putting in default is not necessary where the party owing compliance is unable to perform, or where, on demand, he refuses absolutely to comply or seeks to impose conditions foreign to the contract.  
Alford v. Tiblier, 151.  
Hays v. Smith Bros. & Co., 193.
6. The term of a contract is ordinarily presumed to be for the benefit of the debtor, but it may be for the mutual benefit of both parties, or for that of the creditor alone. In the last case, the creditor may waive it, and put his debtor *in mora* before its expiration, provided the debtor is not injured by such waiver.  
Alford v. Tiblier, 151.
7. Where a vendor fails to deliver, the measure of damage is the difference between the contract price, and that of the market upon the date when delivery should have been made. *Ib.*
8. Where delivery is stipulated for in a particular place, the market price of that place must govern, whatever be the eventual use to which the purchaser contemplated putting his property. *Ib.*
9. A sheriff, aware of the debtor's insolvency, who executes an order of sale, waiving the formalities and delays of advertisement, although this be with the consent of the seizing creditor, is liable in damages to an injured creditor.  
Tupery v. Harper, 162.
10. In an action for damages upon such a cause of action, the price realized at such a sale will not be taken as the standard of value. *Ib.*
11. In such a case full damages will be given, but not more than have been actually sustained. *Ib.*
12. Damages upon bonds of injunction. See Injunctions, Nos. 3, 5.
13. For liability of parents for damages done by children, see Parent and Child.
14. The discharge of firearms upon the public streets of a city, in such manner as to inflict injury, is gross negligence. *Ib.*
15. He who, in defence to an action for damages, sets up contribution, must prove it. *Ib.*
16. In a suit against a recorder for negligence in issuing a certificate, the injured party may recover, in addition to the price paid for the property lost, the repairs and the expenses incurred in defending title.  
Brown v. Penn, 265.
17. The fact that by paying an additional sum the purchaser might have quieted his title, is no defence in such a case. *Ib.*
18. The fact that a shed or awning is erected by one person, in contravention to a city ordinance, does not authorize another to demolish it of his own motion.  
Laviosa v. Railroad, 299.
19. The sanction or assistance of city authorities does not exonerate from liability the one at whose instance or solicitation an illegal act is done, *Ib.*
20. Where water used for purposes of irrigation on a rice farm percolates through the enclosing levees, and injures the crops on an adjoining sugar plantation, notwithstanding the exhaustion by the rice planter



of all the usual and customary modes to prevent the sepage, and protect his neighbor, the damage resulting therefrom will be *damnum absque injuria*. Nagel v. Madere, 345.

21. In cases of injury to live stock, railroad companies will be held liable, when their employees, by exercising the necessary vigilance, might have seen, at a proper distance, the animals on the track, and with due regard to the safety of the passengers, have stopped the train before it struck them, but failed so to do. Fossier v. R. R. Co., 349.  
See Estoppel, No. 7.  
Prescription, No. 8.  
Landlord and Tenant, No. 5.  
Taxation, Nos. 17, 18.  
Res Judicata.

#### DEFAULT.

A suit to rescind a transaction must be preceded by a tender of restitution; such as, if accepted, would restore all parties to the condition they were in before such transaction.

Adams & Co. v. Moulton, 210.

See Damages, Nos. 5, 6.  
Obligations, Nos. 6, 7, 8, 9, 10.

#### DELAY, STIPULATION FOR. See Damages, No. 6.

#### DELIVERY.

1. A purchaser cannot be compelled to sever his purchase and receive partial deliveries. Alford v. Tiblier, 151.
2. Where a purchaser has accepted part of the goods, the vendor may receive when tendered a corresponding portion of the price, without necessarily waiving the remainder of his demand. Hays v. Smith Bros. & Co., 193.
3. Where the place of delivery is not fixed by contract, the law directs that it shall be made at the place where the property is located. Keuner v. Allen & Syme, 214.
4. Where the place of delivery is not declared or shown to be material, a mere error in the statement as to the location of the property will not of itself vitiate the contract. *Ib.*
5. Nor will the mere removal, through inadvertence, after sale, of itself rescind the contract. *Ib.*  
See Damages, Nos. 7, 8.  
Obligations, Nos. 7, 8, 9, 10.

#### ERROR.

1. A creditor, participating in a judicial distribution of proceeds, might, if acting under error of fact, upon proper allegations, rescind the settlement. Adams & Co. v. Moulton, 239.  
See Estoppel, Nos. 14, 15, 16.

#### ESTOPPEL.

1. Men have the right to presume that their neighbors speak and act the truth, and to transact business accordingly. Lochte & Cordes v. Gélé, 52.  
*Ib.*
2. Estoppels may be by actions as well as words. *Ib.*
3. Where one permits his name to be used upon the business sign of another, he is liable as principal to innocent parties who are deceived. *Ib.*
4. Where a party calls for the production of particular books, he cannot be heard objecting to them as evidence. Carroll v. Peters, 88.
5. Legal responsibility, depending solely upon implication, can follow only such circumstances as cannot be reasonably explained, except upon the supposition that the party intended to bind himself. *Ib.*
6. The surety on a lease, as a party to the contract, cannot deny the capacity of his principal. Variol v. Doherty, 118.

7. A party cannot set up as a defence his own ignorance of the difficulties or dangers attached to the work he has undertaken to perform,  
Wood Bros. v. Harbor Towboat Co., 121.  
See Common Carrier, No. 5.
8. One whose duty is to keep down the taxes on particular property cannot profit by his own default, and acquire the property by tax-title against those whom he has wronged. Martel v. Smith *et al.*, 167.
9. Where, by decree of court, one is authorized to do certain things in which others are interested, and by authority thereof he performs a portion of what the decree permits, he accepts the charge and is bound for the complete performance. Decuir v. Ferrier, 205.
10. One who advisedly complies, either partially or entirely, with the obligation of a judgment or contract, will not be heard declaring that he was no party to such contract or judgment. *Ib.*
11. The same, where, when sued for the nullity of such judgment, he has defended it as valid. *Ib.*
12. One who has taken all or a portion of the proceeds of a judicial sale, cannot dispute its validity. Adams & Co. v. Moulton, 210.
13. One of several owners of a concurrent mortgage, who holds at the same time a superior special privilege, by permitting and participating in a distribution of all the proceeds among the mortgage creditors, waives the privilege. *Ib.*
14. Parties discovering error, fraud, etc., vitiation of a contract, in order to avail themselves thereof, must, so soon as the vice is discovered, repudiate the entire agreement. Marshal v. Sims, Billups & Co., 223.
15. If, instead of so doing, they continue to carry out the contract, there is a waiver of objection. *Ib.*
16. No man can complain of a state of affairs which he could have prevented or terminated at any time. *Ib.*
17. One who, on motion to dissolve an injunction, asks for damages against the principal and surety upon the bond, accepts the bond.  
Walters v. Faulk, 236.  
See Agency, Nos. 1, 17.  
Appeal, Nos. 26, 35.  
Common Alley, Nos. 2, 4.  
Damages, No. 4.  
Delivery, No. 2.  
Error, No. 1.  
Evidence, No. 3.  
Landlord and Tenant, No. 4.

#### EVIDENCE.

1. Courts will take judicial cognizance of the meaning of words and terms forming part of the prevalent language of a country.  
Clavie & Noble v. Waggaman, 35.
2. In cases where the evidence is doubtful, or the testimony conflicting, the judgment appealed from will not be readily disturbed.  
Denegre v. Bayley, 51.  
Dreyfus v. Lincoln, 313.  
Nagel v. Madere, 325.
3. Presumptions which change the burden of proof, cease to have that effect when their own force is impaired or broken.  
Montegut v. Waggaman, 69.
4. Where a tender of the books of a firm in evidence is made, and objections are reserved only on particular grounds, which are untenable, the evidence will be considered. Carroll v. Peters, 83.
5. Parol evidence is admissible to establish a contract with a broker to sell real estate, and fixing his compensation.  
Houston v. Boagni, 164.
6. Where, upon admissions in open court, a debtor of an estate is authorized to distribute among the creditors the fund represented by the debt he owes, taking their receipts, it will be implied, without special mention in the order, that the debtor made the necessary proposition, of

- which such decree was the acceptance, and he will be held accordingly.  
Decuir v. Ferrier, 205.
8. An agreement to pay interest beyond five per cent. cannot be proved by parol. Page & Moran v. Valery, 208.
  9. In a suit to reduce assessments, the burden of proof is upon the taxpayer to establish error on the part of the assessor. Tragar v. Clayton, 228.
  10. The recitation of due notice to mortgagees in an order of a bankrupt court, ordering the sale of property free from incumbrances, furnishes only *prima facie* proof. Thompson v. Lemelle, 245.
  11. This court will not notice, *ex propria motu*, the rules of the court of first instance. Dours v. Cazentre, 251.
  12. Orders and decrees of a court of record can be shown only by formal notes or entries; and where there is no such note or entry, such orders or decrees will be presumed never to have existed. *Ib.*
  13. The mere presumption that a clerk of court did his duty, is outweighed by the authority of a formal judgment. *Ib.*
  14. He who alleges contributory negligence must prove it. Marrioneaux v. Brugier, 257.
  15. Where a bill of exceptions is taken to evidence, and later the fact touched by such evidence is admitted, the bill will not be considered. Brown v. Penn, 265.
  16. A substantial or material fact, not alleged, cannot be proved. Alford, Bettis & Co. v. Hancock & Sons, 280.  
Lorenzen v. Woods, 373.
  17. Nor can the proof contradict the allegations. *Ib.*
  18. Where a claim is sued upon, and the allegation is that it arose from direct dealings between plaintiffs and defendants, and the truth is that plaintiffs hold it as assignees, the latter fact cannot be proven. *Ib.*
  19. An insurance company, pleading the forfeiture of a policy, must prove it. Ziegler v. Ins. Association, 284.
  20. Where the testimony has been reduced to writing, by questions and answers, the latter must be construed in connection with the former. *Ib.*
  21. Courts will not notice, *ex propria motu*, municipal legislation. Laviosa v. R. R. Co., 299.
  22. In absence of a general consent, unsworn statements cannot be received or acted upon as proof. Wood v. Howard, 310.
  23. Circumstantial evidence, to supply the place of direct proof, must point plainly to a particular conclusion, and be susceptible of reasonable explanation only upon such particular theory. Dreyfus v. Lincoln, 313.
  24. For effect of evidence beyond pleadings, see Carroll v. Wallace, 9.  
See Agency, No. 3.  
Appeal, Nos. 29, 30.  
Bills and Notes, Nos. 5, 6, 7, 8, 9, 10, 11.  
Common Alley, No. 3.  
Common Carriers, Nos. 2, 4  
Damages, Nos. 2, 3, 4, 9, 10, 15.  
Estoppel, No. 4.  
See, also, Hays v. Smith Bros. & Co., 193.

EXECUTION, PIERI FACIAS, Etc.

1. Where the description of property sold, was not sufficient to enable the public to know the property which was to be sold at public sale, the sale is void. Schwartz v. Huer, 81.
2. Where the bid is insufficient to satisfy the privileges and mortgages bearing on the property, and having a preference over the judgment creditor, there can be no adjudication; and if one is made it is null. C. P., 684. State *ex rel.* v. Recorder, 190.  
Adams & Co. v. Moulton, 210.
3. This, however, applies only where the prior mortgages or privileges are *special*. Adams & Co. v. Moulton, 210.

4. A bid at a public sale is for the *absolute value*, and implies no assumption of prior claims. *Ib.*
5. A public sale includes the *standing crop*, which is covered by the bid. *Ib.*
6. The delays allowed by law for advertisement may be waived by the debtor. *Tupery v Harper*, 162.
7. Such a renunciation, however, by an insolvent debtor, in favor of a particular creditor, by which the value of his property is diminished, is contrary to good morals, and void. *Ib.*
8. For liability of sheriff executing sale under such circumstances, see Damages, 9, 10, 11.
9. The price realized at such sale not a guide as to real value. *Ib.*  
See Damages, Nos. 2, 3, 4.  
Estoppel, Nos. 12, 13.  
Exemptions.  
Garnishment.  
Taxation, Nos. 5, 17, 18.

**EXEMPTIONS.**

1. The property of the debtor is the common pledge of all his creditors. *Pitard v. Carey*, 289.
2. Hence, exemptions are strictly construed. *Ib.*
3. A contractor, doing work upon a public building belonging to the State, is not an *officer*, as contemplated by La. C. C. 1992; neither is his compensation *salary*, and hence exempt. *Ib.*
4. The term "salary of an officer," as used in La. C. C. 1992, etc., applies only to the compensation due public officials or employees, which is for personal service, and payable at fixed rates, by the month or year. *Ib.*  
See Homesteads.

**EXPROPRIATION.** See Railroads, Right of Way.**FUTURES.** See Obligations, Nos. 12 to 21.**FRAUD.** See Bills and Notes, Nos. 3, 6, 7, 9, 10, 11.  
Estoppel, Nos. 14, 15.**GARNISHMENT.**

1. For jurisdiction in cases of, see Appeals, Nos. 3, 4, 5, 42.
2. For distinction between traverse and rule to take *pro confessis*, and effect of evidence beyond pleadings, see Appeals, Nos. 3, 4, 5.
3. Where the sovereign, or any of its agents, are proceeded against, in garnishment, the debtor has no right to avail himself of the exemption of such sovereign from judicial pursuit. *Pitard v. Carey*, 289.
4. Where a garnishee answers without reservation, he cannot subsequently complain of insufficiency of notice or of information. *Carroll v. Wallace*, 316.
5. The garnishee, in his answers, must disclose all that is necessary to inform plaintiff, and to enable the court to determine fully the question of right in or to the property disclosed. *Ib.*
6. The plaintiff, in an attachment, cannot have the garnishee condemned, until after final judgment against the defendant. *McGloin, J.*, doubting. *Ib.*

**HEIRS.**

1. La. C. C. Art. 999, holding him who, without judicial authorization, disposes of the property of a succession for the debts of such succession, is founded upon the reason of the article preceding (998); that he (the heir) has done some act necessarily indicating the intention to accept, and which he had no right to do, except in the quality as heir. *Lacey v. Ferguson*, 171.
2. An act of piety or humanity towards one's relations is not considered an acceptance of a succession. *Ib.*
3. When a succession will not defray the expense of administration, the heir need not have it administered. *Ib.*

4. Heirs who have not made an inventory are not bound *in solido* but each only for his *virile share*. *Ib.*  
See Judgments, Nos. 18, 19.

#### HOMESTEADS.

1. Homestead laws, being in derogation of common right, must be strictly construed. *Parnell v. Allen*, 321.
2. A party claiming a homestead, under section 1691 of the Revised Statutes, on the grounds that he has persons dependent on him for support, must show such dependence to be *actual* and *necessary*. *Ib.*
3. The fact of being the head of a family, *per se*, does not entitle a party to a homestead under said section. *Ib.*
4. The exemption right must be tested by the state of facts existing at the time the same is sought to be enforced. *Ib.*

#### HUSBAND AND WIFE.

1. In an action upon a community debt, in the name of both the spouses, that of the wife is mere surplusage. *Brown v. Penn*, 265.
2. No law prohibits the placing of a community asset in the name of the wife; and a husband may ask for judgment in the name of a wife upon such a debt. *Ib.*  
See Landlord and Tenant, No. 3.

#### INJUNCTION.

1. Effect of injunction as dissolving agency. See Agency, Nos. 15, 16.
2. In a petition for injunction, where there is a cumulation of grounds, some of which are other than those specified in C. P. Art. 739 as authorizing the writ without bond, a bond must be given. *Canby v. Gerodias*, 217.
3. The damages which, under the statute, and upon the dissolution of the injunction, may be accorded against principal and surety without proof, cannot exceed *twenty per centum*. This *per centum* must cover all damages, beside interest, unless the proof establishes more. *Ib.*
4. For construction of injunction bonds, see Bonds, No. 1.
5. For estoppel, resulting from demand for damages against plaintiff and surety, see Estoppel, No. 17.
6. By the writ of injunction parties may be compelled to do, as well as to refrain from doing. *Petit v. Cormier*, 370.
7. Where a party in peaceful possession of real property has been violently dispossessed, the writ of injunction may be issued to the disturber, commanding him to restore possession. *Ib.*  
See Appeal, Nos. 22, 23.  
Judgment, No. 2.

#### INSOLVENCY.

1. For waivers by insolvent debtor under seizure, see Execution, Nos. 6, 7, 8, 9.
2. A *cessio bonorum*, under the insolvent laws of Louisiana, is no bar to a suit by a non-resident creditor, even in the State court, where such creditor has not participated. [*Contra*, *McGloin*, Judge, in *Hemphill*, *Hamlin & Co. v. Braun*, p. 326].  
*August, Bernheim & Bauer v. Brown*, 261.
3. Non-resident creditors may urge their suits to personal judgment, even before the insolvent proceedings are at an end, provided they do not interfere with the property surrendered. *Ib.*
4. Non-residents, without the territory of the State, cannot be cited in insolvency proceedings through an attorney for absent creditors. [*Contra*, *McGloin*, Judge, in *Hemphill*, *Hamlin & Co. v. Brown*, p. 326].  
*Ib.*
5. Even such creditors, however, cannot interfere with the distribution of assets surrendered. *August, Bernheim & Bauer v. Brown*, 261.  
*Hemphill, Hamlin & Co. v. Braun*, 326.
6. The personal judgments such creditors may obtain can be enforced only against the debtor's subsequent property.  
*August, Bernheim & Bauer v. Brown*, 261.

7. The *cessio bonorum* dissolves attachments—even those sued out before the cession by a non-resident creditor.  
Hemphill, Hamlin & Co. v. Braun, 326.
8. Such non-resident cannot, however, be forced to cumulate his suit with the proceedings in insolvency. *Ib.*
9. Insolvent laws are for the double purpose of relieving honest debtors, and of insuring justice to creditors. *Ib.*
10. The power of the States, in the absence of national legislation, to enact and enforce such laws, is no longer questionable. *Ib.*
11. The non-resident creditor can claim no greater rights than the resident, when he invokes the resident jurisdiction. *Ib.*  
See Sovereignty.

## INSURANCE.

1. When, by the terms of an open policy, insurance is to be limited to "goods and merchandise," "laden or to be laden" on shipboard, the same to be approved by the insurer, and to be endorsed upon the policy, such policy will not attach to anything not so laden on board, nor will it attach to anything not fairly embraced within the description, "goods and merchandise." Oteri & Bro. v. Ins. Co., 198.
2. Such an open or running policy is, at most, a promise or contract to effect future insurance; and this only upon shipments made in accordance with its terms. *Ib.*
3. It gives no right to the insured to apply thereunder for insurance of things different from those contemplated by and described in the instrument. *Ib.*
4. An application for the endorsement on such a policy of insurance, on "one new sloop in tow of a vessel," creates no obligation to accept it, when, as a fact, the endorsement is not made as demanded. *Ib.*
5. A sloop in tow is not "goods and merchandise," as contemplated by such a policy. *Ib.*
6. Nor is it "laden on shipboard." *Ib.*
7. An insurer, pleading forfeiture, must establish the forfeiture.  
Ziegler v. Ins. Co., 284.

## INTEREST.

1. An agreement to pay interest beyond five per cent. must be established by writing. Page & Moran v. Valery, 208.
2. The act of 1860, p. 130. and its successor, article 2924, La. C. C., last paragraph, whereby the defence of usury against certain written obligations is excluded, applies only to notes, bonds, etc., which evidence a complete contract, including a principal of its own, as well as usurious interest. Dumas v. Boulin, 274.
3. These laws do not apply to a note, etc., which has no consideration other than usurious interest upon another contract. *Ib.*

## INTERPRETATION. See Obligations, Laws.

Constitution, No. 5.

Judgment, Nos. 11, 12, 14,

## INTERVENTION. See Pleading, No. 18.

## JUDGMENTS, DECREES, ORDERS.

1. The action to annul a judgment for fraudulent practices in its obtaining must be brought within one year from the date of the discovery of the fraud. Berkery v. Carroll, 2.
2. A judgment cannot be attacked or enjoined upon grounds that were available as a defence. *Ib.*
3. The validity of the order of a competent court regulating the manner of selling property for a partition, cannot be questioned collaterally. Gauthreaux v. Girardey, 5.
4. For absolute judgments upon confessions only conditional, see Appeal, No. 6.
5. For appeal in cases of several judgments upon but one demand, see Appeal, No. 7.

6. A judgment by a court of limited jurisdiction, in a matter not clearly within the comprehension of the law conferring jurisdiction upon it, is null and void. Howard v. Lacroix, 16.
7. The recognition by a debtor of a judgment upon his schedules in bankruptcy proceedings, may have the effect of interrupting prescription upon the debt itself, but it does not keep alive the judgment. Favrot v. Bates, 130.
8. The judgment in the hypothecary action, and the recordation thereof, have no effect after the extinguishment of the original judgment, either by payment or prescription. Ib.
9. Want of finality in a judgment is no cause of nullity, unless it appear that its execution would be "against good conscience," and that the applicant "could not have availed himself of it in a former suit, or was prevented by fraud or accident." C. P. 606, 607, 608.
10. Where a judgment decrees the payment of rent, or the board of a minor at a fixed rate, for the future, so long as the premises in question are occupied, or the minor boarded, the sum due from time to time may be liquidated by rule. Ib.
11. In determining the issue of *res judicata*, the decretal part of a judgment must govern. Harrison v. Godbold, 178.
12. The reasoning of the court in such case can only serve to interpret the decretal portion, when the latter is ambiguous. Ib.
13. Where plaintiff and defendant present claims and counter claims, and there is judgment in favor of either for a specific sum, and without reservation, the entire controversy is concluded. Ib.
14. Where a judgment is susceptible of two interpretations, the one which renders it more reasonable, effective and conclusive, will be adopted. Ib.
15. Where a privilege has been recognized by a judgment, which latter is duly recorded, the privilege is taken out of the prescription originally applicable to it. State ex rel. v. Recorder, 190.
16. Where a default, duly set aside, has been subsequently confirmed, the final decree is a nullity. Washington v. Comeaux, 234.
17. The withdrawal of counsel of record after they have filed an answer, does not withdraw such answer and restore the default. Ib.
18. To a suit for the revival of a judgment against the heirs of a deceased defendant, all the heirs are necessary parties. Joyce v. Kearney & Bernos, 243.
19. Hence, where one of the heirs pleads minority, the suit cannot proceed until that plea be disposed of, and the exceptor, if a minor, be duly impleaded. Ib.
20. For collateral impeachment of bankruptcy proceedings, and nullity of orders canceling mortgages without notice, and the effect of the recitations of notice contained in such orders, see Bankruptcy, Nos. 8, 9, 10, 11.
21. A judgment of revival does not in any manner affect the nature of the original judgment. Weiler & Ellis v. Blanks, 296.
22. The pendency of an appeal does not suspend prescription, or prevent or render unnecessary a suit to revive; and the suit to revive in no manner affects the appeal. Ib.
23. Judgments for money are prescribed in ten years from the date of the rendition; which date is that of their signing by the inferior court, and not of confirmation by the appellate tribunal. Ib.
24. Any judicial determination, arrived at without notice and a fair opportunity for defence, is null. Wood v. Howard, 310.
25. An order rendered *ex parte*, fixing the fee of a curator *ad hoc*, is void. Ib.
26. For judgments in cases of conflicting evidence, see Appeal, No. 8.  
See Appeal, Nos. 28, 35.  
Banks, Bankruptcy, Nos. 8, 9, 10, 11.  
Estoppel, Nos. 9, 10, 11.

See Evidence, No. 10.  
Pleading, Nos. 6, 19, 40.  
Res Judicata.

#### JURIES, JURY TRIAL.

1. The party demanding a jury trial must make good the jury deposit, if in any wise lost before trial. *Dumas v. Boulin*, 274.
2. The loss of such deposit does not *ipso facto* deprive a party who has demanded it of the right to trial by jury. He should have a reasonable time to replace. *Ib.*
3. If, however, after due notice and demand, he neglects or refuses to replace the lost deposit, it is the same as if no deposit had been originally made. *Ib.*
4. The verdict of a jury will not be disturbed unless clearly erroneous. *Dreyfus v. Lincoln*, 313.  
*Nagel v. Madere*, 325.
5. Where a verdict has been arrived at by means other than conviction of the judgment on the part of the jury, this, if proven, might furnish just cause for remanding. *Dreyfus v. Lincoln*, 313.
6. The mere fact, however, that the jury has awarded plaintiff less than the evidence entitles him to, does not establish the fact that the verdict was one of compromise. *Ib.*

#### JURISDICTION.

1. For appellate jurisdiction, see Appeal.
  2. In suits to reduce assessments, jurisdiction is determined by the amount of the tax demandable upon the sum in dispute. *Tragar v. Clayton*, 228.
  3. Where, by plaintiff's pleadings, its jurisdiction appears, an inferior court will not be prohibited from entertaining the cause, upon the simple averment of the defendant that the controversy is beyond its jurisdiction. *State ex rel. v. Pflug*, 225.
  4. Such a question must be first presented to the inferior court by exception, and be determined upon by it, before superior authority can be invoked. *Ib.*
  5. If the cause be appealable, the defendant must go even further in the ordinary way, and bring the question before the higher court by appeal. *Ib.*
  6. In proceedings to eject a tenant, the justice's jurisdiction is determined by the allegations of the plaintiff, unless the contrary is made to appear by proof. *Ib.*
  7. Where a district court has no original jurisdiction over a controversy, and the writ is not necessary to aid it in the exercise of its appellate jurisdiction it cannot issue a writ of prohibition. *Ib.*
  8. Courts have the power to annul municipal legislation which is unreasonable or oppressive. This power, however, will be exercised reluctantly and with extreme caution. *Laviosa v. R. R. Co.*, 299.
- See Appeal, Nos 28, 33, 34, 44.  
Attachments, Nos. 1, 2.  
Banks, Bankruptcy, Nos. 8, 9, 10, 11.  
Mandamus, No. 3.  
Pleading, Nos. 41, 42, 43.  
Railroads, Nos. 1, 2.  
Sovereignty, Nos. 5, 9.  
Taxation, Nos. 12, 13.

#### JUSTICES OF THE PEACE. See Jurisdiction, No. 6.

#### LANDLORD AND TENANT, LEASE.

1. Where the owner of landed property permits his tenant to build against a wall between his property and another, but which had not been in common, the landlord, and not the tenant, becomes liable for the half value of such wall. *Faisans v. Lovie*, 113.
2. The surety on a lease is not discharged by the mere failure of the lessor to enforce or preserve his privilege. *Variol v. Doherty*, 118.



3. Where the lessee is a public merchant, the husband's authorization is not necessary to her contract of lease, nor to the exemption of rent notes. *Ib.*
4. Where the true condition of rented premises can be readily observed at the time of leasing, the tenant cannot subsequently complain of a defect in the drainage. *Lorenzen v. Woods, 373.*
5. The mere fear that, in the future, a tenant or his family may be affected injuriously by the defective drainage of rented premises, affords no ground for damage. *Ib.*
6. Where rented premises are in need of repairs, the remedy of the tenant is to duly notify the landlord; and if the latter fails to make them, the tenant may then apply the rent due, so far as necessary, to such repairs. *Ib.*
7. In such case, where there is a lease, and the amount of the entire rental is sufficient, it makes no difference that only a month or two of the rent is actually due; the tenant has the security of the rent for the whole term. *Ib.*
8. Where the tenant has not so notified the landlord, and, if necessary, made the repairs himself, he cannot refuse to pay the rent as it falls due. *Ib.*
9. A city ordinance forbidding the erection of buildings upon lots until such lots have been inspected, and a certificate of proper grading has issued, cannot apply to houses erected before its passage. *Ib.*
10. The fact that houses erected before the passage of such an ordinance, have not under them lots that have been graded and inspected in accordance with the provisions thereof, affords to the tenant no reason for refusing to pay the rent stipulated. *Ib.*
11. The ordinance of the city of New Orleans, authorizing the Board of Health to inspect and condemn premises which are in an unhealthy condition, authorizes said board to cause such premises to be vacated and closed, so to remain until rehabilitated. Such a law does not justify the tenant who has not had the premises condemned, and who has not vacated, to refuse the payment of rent. *Ib.*  
See Estoppel, No. 66.  
Jurisdiction, No. 5.  
Prescription, No. 7.

#### LAWS, INTERPRETATION OF, Etc.

1. Laws are not to be readily construed as prohibitory. *Gauthreaux v. Girardey, 5.*
2. They are not to be interpreted so as to enlarge or restrain the intent of parties, or to restrict the liberty of contract, except where there is an express prohibition, and one which parties have not the right to modify. *Ib.*
3. Section 3548, R. S., directing certain public sales to be made by sheriffs, does not prevent the regulation of these matters between parties, by consent. *Ib.*
4. Section 3549, R. S., is not an enumeration of exceptions to R. S. 3548. It simply extends to representatives the right to regulate such matters by agreement. *Ib.*
5. Where the letter of a statute is doubtful or ambiguous, courts must seek the object the legislature had in view, and the purposes sought to be accomplished. *Howard v. Lacroix, 16.*
6. Although the caption of a statute cannot control the text, yet, where the latter is doubtful, the caption furnishes the best guide as to the objects and purposes of the law. *Ib.*
7. Where a law expressly enumerates the persons and cases to which it shall be applicable, all others are excluded. *Payne, Kennedy & Co. v. Katz & Barnett, 18.*
8. Where a particular matter has been made the subject of express legis-

lation, as to it, the courts no longer have the equitable discretion given by C. C. 21.

Payne, Kennedy & Co. v. Katz & Barnett, 18.  
Clavarie & Noble v. Waggaman, 35.  
Conery & Son v. Waggaman, 43.  
Alford, Bettis & Co. v. Hancock & Sons, 280.  
Pitard v. Carey, 289.

9. Courts should presume that legislators were familiar with all existing laws bearing upon subjects that are being legislated upon. This, however, is not an absolute presumption.

Clavarie & Noble v. Waggaman, 35.

10. Where reasonably possible, courts will adopt an interpretation which is reasonable and just, rather than one which is unjust or absurd. *Ib.*

11. Nevertheless, above all things, the actual legislative intent must be sought and enforced, and so long as this is within constitutional limits, apparent injustice or absurdity affords no reason for a refusal to comply with the law as it really is. *Ib.*

12. The presumption that the legislature had, in all its enactments, some purpose to accomplish, is conclusive, and courts are not at liberty to adopt interpretations which are virtual repeals. *Ib.*

13. The titles and indices used by editors and codifiers, while no portion of the law, may serve in cases of doubt, as going to show the meaning usually assigned to particular words or expressions.

Conery & Son v. Waggaman, 43.

14. Under the code of Louisiana, the distinction between laws that are odious and laws entitled to favor, with a view to narrowing or extending their construction, cannot be made. C. C. Art. 20. *Ib.*

15. This court will endeavor to observe the established jurisprudence of the State as determined by the Supreme Court.

Rogers v. Goldthwaite, 127.

16. The courts will not lightly impute to legislation a retroactive effect.

Rogers v. Goldthwaite, 127.

Dours v. Cazentre, 251.

18. Where, however, legislation is not *ex post facto*, does not divest vested rights or impair the obligation of a contract, it may be retroactive.

Dours v. Cazentre, 251.

19. In interpreting doubtful portions of a statute, the context must be appealed to if it furnishes the key.

Dumas v. Boulin, 274.

20. It is primarily the province of the legislature to regulate matters of public policy, and where it has undertaken so to do, the courts must enforce its will.

Pitard v. Carey, 289.

21. Individuals may renounce what the law has established in their favor; provided, the rights of others are not affected, and the renunciation is not against public policy.

Tupery v. Harper, 162.

• **LEVEES.** See Damages, No. 20.

#### **MANDAMUS.**

1. Where there is already an adequate remedy by law, a mandamus cannot issue.

State ex rel. Forman v. City, 47.

2. Where a party has obtained a judgment against the city of New Orleans, declaring a certain thing to be a nuisance and ordering its abatement as such, the remedy is not by mandamus against the municipal authorities. The sheriff has authority to execute such a decree. *Ib.*

3. Courts will not by mandamus interfere with the discretion of an executive officer.

State ex rel. v. Jumel, 144.

**MARKETS.** See Constitution, Nos. 1, 2, 3, 4.

**MARRIAGE, MARRIED WOMEN.** See Husband and Wife.

**MINORS.** See Parent and Child.

Judgments, Nos. 18, 19.

Pleading, No. 16.

**MONOPOLIES.** See Constitution, Nos. 1, 2, 3, 4.

- MORTGAGES, PRIVILEGES.** See Estoppel, No. 13.  
Evidence, No. 10.  
Execution, Nos. 2, 3, 4.  
Exemptions, No. 1.  
Judgments, Nos. 8, 15.
- MUNICIPAL CORPORATIONS.** See Damages, Nos. 13, 17, 18.  
Evidence, No. 21.  
Landlord and Tenant, Nos. 9, 10, 11.  
Markets.  
Mandamus, No. 2.  
Nuisances.  
Railroads, Right of Way, etc.
- NEW ORLEANS.** See Constitution, Nos. 1, 2, 3, 4.  
Landlord and Tenant, Nos. 9, 10, 11.  
Mandamus, No. 2.  
Markets.  
Municipal Corporations.
- NEW TRIAL.** See Appeal, No. 43.  
Juries, Jury Trial, Nos. 5, 6.  
Judgment, No. 27.  
Pleading, Nos. 1, 2, 6, 40.
- NOTICE.** See Agency, Nos. 15, 16.  
Attorney-at-Law, No. 1.  
Evidence, No. 10.  
Garnishment, Nos. 4, 5.  
Insolvency, No. 4.  
Surety, No. 2.
- NUISANCE.**
1. Where, by law, certain restrictions are placed upon upon the erection of awnings, sheds, etc., such erections are not nuisances unless they violate these prohibitions. *Laviosa v. Railroad*, 299.
  2. Without general legislation denouncing all of a special or particular class, no particular thing can, by municipal authority, be declared to be a nuisance, or be abated as such. *Ib.*  
See Damages, Nos. 17, 18.  
Mandamus, No. 2.  
Appeal, No. 21.  
Railroads, Right of Way.
- NULLITY.** See Appeal, No. 28.  
Bankruptcy, Nos. 8, 9, 10, 11.  
Execution, Nos. 6, 7.  
Judgments, Nos. 1, 2, 3, 6, 9, 16, 24, 25.
- OBLIGATIONS. INTERPRETATION OF, ETC.**
1. Where a party has been for years employed by another, during which time his salary has been several times increased, and throughout board has been considered as included, without special stipulation to that effect, the former has the right, in subsequent negotiations, to consider his board as still included; and if the employer contemplates a change in this regard, it is incumbent upon him to mention the fact. *Godbold v. Harrison*, 31.
  2. In default of agreement to that effect, express or implied, persons doing works of construction or repair by the job, are not bound to charge for the labor and material furnished, no more than what they themselves have actually paid. *Brady & McLelland v. Eva*, 49.
  3. Such persons, when not mere superintendents, disbursing as such the principal's money, are entitled to compensation for their own services, their judgment and experience, for the skill employed, for the use of their tools and appliances, and for the guarantees assumed. In default

- of contrary agreement, they may remunerate themselves for all this, by charging such advance upon disbursements as will, in the aggregate, amount to a fair compensation. *Ib.*
4. In the absence of express stipulation, the value of such services, etc., is to be determined by the law of supply and demand. So, where the number engaged in any particular business is limited, they may adopt card-rates, which, being observed by all, establish a market price. *Ib.*
  5. A clause in a contract of sale that the measurement shall be by a person named, is obligatory. *Danner & Co. v. Otis*, 137.
  6. Where defendants purchased two hundred casks seltzer water, packed in Prussia, each cask of one hundred stone jugs, and it is shown that such casks cannot be transported without some breakage of jugs: held, that these circumstances entered into the contract, and where the actual breakage is not beyond what is usual, the vendee cannot demand a rescission. *Hays v. Smith Bros. & Co.*, 193.
  7. Where defendant was in default for refusing to receive, plaintiff was not compelled to sell at defendant's risk immediately. Mere delay and indulgence in such a case does not release defendant. *Ib.*
  8. The sale of goods of which a purchaser has refused delivery, at the risk of the latter, is not a sale *a la folle enchere*, as provided for in the *La. C. C.* *Ib.*
  9. Where a purchaser refuses compliance with his contract, the seller may store the property at the risk of the former, retaining, however, in himself, the possession to secure payment of the price. *Ib.*
  10. Unless such storing be in the name of the purchaser, it is not a *con-signment* divesting the seller of his right of possession until payment of price. *Ib.*
  11. A party cannot demand the partial rescission of a contract. *Marshal v. Sims, Billups & Co.*, 223.
  12. Under the laws of this State, aleatory or gaming contracts are void. *Succession of Condon*, 351.
  13. Whether a contract be aleatory or not, is a question of intent.
  14. A contract for the sale of cotton futures, where neither delivery nor payment of price is contemplated, but only an adjustment of differences, is aleatory and void. *Ib.*
  15. The intent to wager may be implied, and circumstantial evidence is admissible to show its character. *Ib.*
  16. The courts are not bound, in these cases, by the form or expressions of the contract, nor by Cotton Exchange rules. *Ib.*
  17. The manner of settling prior transactions between the parties, similar to the one under investigation, may be considered. *Ib.*
  18. Likewise, the manner in which the particular contract itself has been adjusted. *Ib.*
  19. So, also, the fact that the parties were in no condition to make or accept delivery or payment. *Ib.*
  20. In such a case, the particular contract being one out of many, all going to form the business known as dealing in futures, the general character of that business is a proper subject of investigation. *Ib.*
  21. The fact that a dealer in futures fills or executes, through the agency of some other firm, the orders he has received, does not render such dealer a broker.
- See Agency.  
 Bills and Notes.  
 Damages, No. 1.  
 Default.  
 Delivery.  
 Estoppel.  
 Evidence, Nos. 5, 6.  
 Interest.  
 Laws, Nos. 1, 2.  
 Prescription, Nos. 1, 2, 21.

**OFFENCES AND QUASI-OFFENCES.**

See Damages, Nos. 2, 3, 4, 9, 10, 11, 14, 16, 17, 18, 19.  
Officers, Nos. 2, 3, 4, 5, 6, 10.

**OFFICERS, SHERIFFS, RECORDERS, Etc.**

1. Public offices are not established for the benefit of incumbents, but in the interest of the people, and for the performance of services of public necessity. Therefore, legislation imposing certain duties upon sheriffs, and according compensation therefor in the shape of fees, is not to be considered as having for its object the pecuniary profit of such officers.  
Gauthreaux v. Girardey, 5.
2. Sheriffs and their deputies, as public officers, owe to the community the strictest impartiality; and to favor one litigant at the expense of another, is a violation of duty.  
Montegut v. Waggaman, 69.
3. Neither a sheriff nor his deputy have the right to undertake to watch over or protect the interests of particular persons to the prejudice of others, in matters connected with or pertaining to their official duties.  
Ib.
4. They cannot, to the detriment of persons demanding their services, make public information coming to their knowledge officially, or by reason or in consequence of their official character.  
Ib.
5. They must strive to render effective all mandates and writs of courts, whose executive officers they are.  
Ib.
6. They must respond to the exigency of the writs they hold, exercising, in connection with each the diligence necessary to render it effective.  
Ib.
7. It is the duty of public officers to do everything necessary for a prompt, faithful and intelligent discharge of the duties imposed upon them by law.  
Herron v. McEnery, 108.
8. The books which the Recorder of Mortgages for the Parish of Orleans has purchased and placed in his office for use in recording, and which have been already partially filled, are public property.  
Ib.
9. The researches or memoranda of mortgages existing against certain persons, which have been made by the clerks of the recorders, and which are used in facilitating the preparation of certificates, are archives of the office, and not the private property of the recorders.  
Ib.
10. The action against a recorder for damages resulting from issuing a false certificate, arises *ex contractu*, and is prescriptible accordingly.  
Brown v. Penn, 265.

See Damages, Nos. 2, 3, 4, 9, 10, 11, 16, 17, 18.  
Evidence, No. 13.  
Exemptions, Nos. 3, 4.  
Mandamus, Nos. 2, 3.

**PARENT AND CHILD.**

1. The father is liable for damages occasioned by his minor child residing with him, or placed by him with other persons.  
Marrioneaux v. Brugier, 257.
2. The restriction of La. C. C. 2320 applies only to masters or employers, teachers or artisans.  
Ib.

**PARTNERSHIP.**

1. The principle that, upon a dissolution of a partnership, its firm name ceases to exist, does not prevent the former partners from using it again, by common consent, in any particular transaction.  
Marshal v. Sims, Billups & Co., 223.

See Appeal, Nos. 38, 39, 40, 45.

**PAYMENT.**

1. In default of particular imputation by parties, partial payments, other things being equal, will be imputed to the oldest debts.  
Dewar v. Bierne & Co., 75.

See Delivery, No. 2.  
Pleading, Nos. 11, 21.  
Prescription, No. 4.

## PLEADING, PRACTICE, PARTIES.

1. The court, having entertained a motion for a new trial, and assigned a day for rehearing, should not, *ex parte*, and previous to such return day, have dismissed the same.  
Payne, Kennedy & Co. v. Katz & Barnett, 18.
2. The rule is that parties are entitled to a fair trial, simplified so far as possible, and freed from all alien and confusing issues. *Ib.*
3. Where a third person is wrongfully brought into a suit, any of the parties may object to his presence. *Ib.*
4. The right to call in warranty cannot be extended beyond the cases particularly enumerated by law. *Ib.*
5. A third party cannot be called in by a plaintiff or warrantor. *Ib.*
6. Parties praying for a trial by jury are entitled to a fair and full trial by such jury, and where such has not been had the cause will be remanded. *Ib.*
7. A demand in reconvention must appear, *by the pleadings*, to be connected with and incidental to the principal demand.  
Godbold v. Harrison, 31.
8. A demand, not equally liquidated with that of plaintiff, cannot be used or plead in compensation.  
Godbold v. Harrison, 31.  
Baldwin v. Handy, 189.
9. The plea in compensation admits the debt sued upon; and, even where the counter claim is of such a nature as to serve either for compensation or reconvention, and defendant escapes the confession involved in the one by advancing his demand in the shape of a reconvention alone, he cannot, without amendment, have his plea considered as one in compensation. *Ib.*
10. As a matter of pleading, there is a distinction between the pleas of want of consideration and failure of consideration; the latter of necessity admits the original existence of a consideration, and involves in all cases an assumption of the burden of proof.  
Denegre v. Bayley, Jr., 51.
11. One who pretends that a claim is cancelled, or in any manner extinguished, must set up these defences in his answer.  
Grabfelder & Co. v. Navra, 63.
12. Failure to so do, to employ counsel, or to otherwise properly defend a suit, is no ground for a new trial. *Ib.*
13. An action for damages for slander of title is not in the nature of a petitory action, and the plaintiff in such a suit does not assume the burden of proof. Schwartz v. Huer, 81.
14. Where defendant in such suit sets up title by way of reconvention, his demand is petitory in its nature, and he has upon him the burden of proof. *Ib.*
15. A simple averment that a certain measurement is not correct, according to a particular rule not mentioned in the agreement, will not warrant the introduction of evidence to contradict, annul or amplify the contract. (See Arbitration.) Danner & Co. v. Otis, 137.
16. Service of a rule upon the attorney of record of B, although the judgment which is the foundation of such rule is against "B, Tutor," where B has no individual interest, and the caption of the rule served bore a correct designation of parties, and it appears of record that the attorney "for defendant" was present at the trial of the rule.  
Smith v. Barkmeyer, 139.
17. An agreement to arbitrate must be specially pleaded; and it is waived where other defences are presented without such special pleading.  
Alford v. Tibbler, 151.
18. If the record shows no motion of the plaintiff to strike out an intervention, and no objection to evidences tendered to support it, the intervention must be passed upon. Worman v. Miller, 158.
19. Where defendant presents a counter claim, either by way of compensation or reconvention, not properly pleadable as such, and full evidence has been received thereon by the judge *a quo*, despite objection,

- the appellate court, if upon the merits the cause be with the objector, will, in the interest of such objector, ignore the objection and determine finally the controversy. *Harrison v. Godbold*, 178.
20. The general denial of an endorser puts plaintiff to proof of due notice of protest. *Page & Moran v. Valery*, 208.
21. If, however, the plea of payment be added to the general denial, the controversy is restricted to the former plea alone. *Ib.*
22. The exception of no cause of action admits, for the purposes of its trial, the allegations of the petition. *Adams & Co. v. Moulton*, 210.
23. All participating parties, interested in the maintenance of a common transaction, must be made parties to an action for its rescission. *Ib.*
24. In actions joint in their nature all the joint defendants must be cited. *Morgan's R. R. v. Bourdier & Ballesein*, 232.
25. All the owners of land in undivided interests must be proceeded against when such land is to be expropriated, and each is entitled to all the citations and notices provided for by the statute. *Ib.*
26. In a suit to revive a judgment against the heirs of a deceased defendant, all the heirs are necessary parties. *Joyce v. Kearney & Bernos*, 243.
27. The act 39 of 1880, providing for the transfer of causes to a dead docket, was retroactive as well retrospective, and applied to causes that had already, at the date of its passage, been "continued indefinitely and remanded for one year." *Dours v. Cazentre*, 251.
28. Where, however, it was not shown that the cause was in fact placed upon the dead docket, it will not, on appeal, be presumed that the transfer was made in fact, *Ib.*
29. It is not the duty of a plaintiff to see that his cause has been transferred to the dead docket. *Ib.*
30. Neither could he be held to institute proceedings to reinstate his cause upon a docket from which, in fact, it had never been removed. *Ib.*
31. Where prescription is plead as an answer, and the party filing this plea, by leave of court, withdraws it to present a declinatory exception, prescription is waived. *Marrioneaux v. Brugier*, 257.
32. The wife's name, with the husband's, in a suit upon a community debt, is mere surplusage. *Brown v. Penu*, 265.
33. One holding the legal title may sue upon it for the benefit of another. *Ib.*
34. Hence a husband may pray for judgment upon a community debt, in the wife's favor. *Ib.*
35. Art. 103, const. 1879, imposes upon the Courts of Appeal the rules of practice regulating the Supreme Court, only in so far as such rules, etc., may be applicable. *Brooks v. Dollard*, 279.
36. The delay of three days, therefore, accorded for the filing of applications for rehearing before the Supreme Court, in appeals coming up outside of New Orleans, is not obligatory upon Courts of Appeal. *Ib.*
37. Where a Court of Appeals has provided that such applications shall be filed before the end of the term, and one is not presented until after the adjournment *sine die*, it will be disregarded. *Ib.*
37. The object of the laws regulating pleadings is due and fair notice. *Alford, Bettis & Co. v. Hancock & Sons*, 280.  
*Lorenzen v. Woods*, 373.
38. A material fact, not alleged, cannot be proved. *Ib.*  
See Evidence, Nos. 16, 17, 18.
39. This court will strictly enforce the laws of this State regulating pleadings. *Alford, Bettis & Co. v. Tiblier*, 280.
40. A judgment or order refusing a new trial need not be signed. *Hemphill, Hamlin & Co. v. Braun*, 326.
41. An opposition to a syndic's account forms a *contestatio litis*, wherein the opposing creditor is plaintiff and the other creditors are defendants in a *concursum*. *Oldstein v. Creditors*, 348.
42. Such an issue cannot be tried in chambers. *Ib.*

43. Section 1936, Revised Statutes, does not authorize the trial of such issues in chambers. It merely authorizes the judge to grant preliminary orders, such as are not required to be granted in open court. *Ib.*
44. A person suing under a special provision of the law must bring himself within its terms. Succession of Monson, 368.
45. The rule that one who relies upon possession alone, without title, must show possession by enclosures and exact measurements, applies only where the defendant in a possessory action sets up an *adverse possession*, based upon mere intrusion or usurpation. It does not apply as against a plaintiff who has been disturbed by one who does not set up in himself an adverse possession. *Petit v. Cormier*, 370.
46. To ascertain what is really demanded by a litigant, the prayer of the petition or answer must be examined. *Lorenzen v. Woods*, 373.
47. The sweeping prayer for *general relief* cannot be made to cover a relief which is primary and important. *Ib.*
48. A defendant advancing counter claims, either by way of reconvention or compensation, must comply with all that is required of an actual plaintiff. *Ib.*
49. In every case, the pleading must state clearly what is the thing demanded, leaving in ambiguity nothing that is material. *Ib.*  
See Appeal, particularly Nos. 26, 34, 35.  
Attorney-at-Law, No. 1.  
Garnishment, Nos. 4, 5, 6.  
Heirs, No. 4.  
Injunction, No. 2.  
Insolvency,  
Judgments, Nos. 2, 3, 9, 10, 13, 17, 18, 19.  
Juries, Jury Trial.  
Jurisdiction.  
Res Judicata.

POSSESSION. See Injunction, No. 7.  
Pleading, Nos. 13, 45.

#### **PRESCRIPTION.**

1. Damages for violation of the stipulations of a lease are due *ex contractu* and not *ex delicto*, and the prescription applicable to actions *ex delicto* does not apply. *Bourdette v. School Board*, 4.
2. Where a party is employed in one capacity, the rendition of occasional services of a different character or higher grade does not alter the prescription applicable. *Dewar v. Bierne & Co.*, 75.
3. Where a laborer is employed by the day or week, the amounts due him for several of such periods do not, ordinarily, merge into a single obligation. They are separate and distinct obligations, each prescriptible in one year. *Ib.*
4. Therefore, even if prescription of such claims can be at all interrupted by partial payments, the payment of what is due, for a particular number of days or weeks, does not interrupt as to what is due for other periods. *Ib.*
5. The placing of a judgment claim upon a schedule in bankruptcy, while it may interrupt as to the debt itself, does not so preserve the judgment. *Favrot v. Bates*, 130.
6. For the waiver of prescription by particular manner of pleading; for the prescription as against suits upon bonds of public officers, see Officers, No. 10.
7. The action for damages for an illegal seizure accrues at the moment of the levy, and is not postponed until the final determination of the litigation involving its validity. *Levy v. Flash, Lewis & Co.*, 124.  
See Appeal, No. 46.  
Judgments, Nos. 1, 7, 8, 15, 22, 23.

PRIVILEGES. See Judgments, No. 15.  
Mortgages.



**PROHIBITION.** See Appeal, No. 1.  
Jurisdiction, Nos. 3, 4, 5, 6, 7.

**QUANTUM MERUIT.** See Obligations, Nos. 2, 3, 4.

**QUASI CONTRACTS.** See Estoppel.

**RAILROADS, RIGHT OF WAY.**

1. Where a citizen cannot prevent the application of the public streets and banquettes, by lawful authority, to the use of a railroad for right of way, etc., he may insist that such streets and banquettes be used in a manner least injurious to him. *Laviosa v. Railroad*, 299.
2. A railroad company may be prevented from making an unreasonable and oppressive use of a street or banquette, despite municipal legislation authorizing the such particular manner of use. *Ib.*
3. There cannot be a separate expropriation of a particular undivided interest in a piece of land.

*Morgan's R. R. Co. v. Bourdier & Ballessien*, 232.

See Damages, No. 21.

Jurisdiction, No. 8.

Pleadings, No. 25.

**RECONVENTION.** See Appeal, No. 20.  
Pleading, Nos. 7, 9, 14, 19, 48.

**RECORDER.** See Officer.

**RESCISSION.** See Estoppel, Nos. 9, 10, 11, 12, 14, 15.  
Default,  
Delivery, Nos. 2, 4, 5.  
Error, No. 1.  
Obligations, Nos. 5, 6, 11.  
Pleading, No. 23.

**RES ADJUDICATA.**

1. Where, in a previous suit, a plaintiff demanded, *generally*, damages as attorney's fees for an illegal seizure, and the result was adverse to him, and in a subsequent suit he claims damage of the same character, on the ground that they were incurred since the filing of the first petition, and since the first judgment: held, that the first judgment was *res adjudicata*. *Levy v. Flash, Lewis & Co.*, 124.

See Costs.

Judgments, Nos. 11, 12, 13, 14, 20.

Prescription, No. 8.

**RECORDS.** See Appeal, Nos. 11, 12, 13, 14, 15, 16, 17, 22, 23.  
Evidence, No. 12.  
Officers, Nos. 8, 9.

**RULES OF COURT.** See Evidence, No. 11.

**SALES, PUBLIC.** See Execution.  
Laws, Nos. 3, 4.  
Taxation, Nos. 4, 5, 6, 7, 10, 11, 17, 18.

**SALES, PRIVATE.** See Delivery.  
Obligations, Nos. 5, 6, 7, 8, 9, 10.  
Taxation, No. 3.

**SHERIFFS.** See Officers.

**SOCIETIES.**

1. Where an "unauthorized corporation," or "private society," is organized for the purpose of creating a common fund and providing a common tomb, and the members are to receive, in return for dues and fees, relief and treatment during illness, burial at death, and certain specified assistance to their widows and orphans when these last are left in necessitous circumstances: held, that the death of a member does not dissolve the association. *Sociedad v. Docurro*, 218.

2. The interest of a member in the assets, etc., of such a society, lapses with his death, and does not pass to his heirs. *Ib.*  
See Appeal, No. 37.  
Surety, Nos. 2, 3, 4.

#### SOVEREIGNTY, STATE.

1. There can be no *vested right* in any particular form of remedy; and the State can control the remedies to be invoked in its own courts.  
Hemphill, Hamlin & Co. v. Braun, 326.
2. The States have full power to regulate the power and manner of contracting, provided only their laws are restricted in applications to the future.  
McGloin, Judge, in Hemphill, Hamlin & Co. v. Braun, 326.
3. The power to enact and enforce insolvency laws is one of sovereignty. *Ib.*
4. The States of this Union, in all respects wherein their powers are not constitutionally restricted, are as sovereign as any of the nations of Europe or of the world. *Ib.*
5. Therefore the discharge lawfully granted under State legislation should be binding upon all—aliens as well as citizens. *Ib.*
6. The laws of a State, applicable to contracts, do not of *right* follow such contracts beyond the borders of such State. *Ib.*
7. The principles of international *courtesy* permit this, but only in cases where the laws of the State from whence the contract comes are not in conflict with those to which it goes. *Ib.*
8. In no case do the remedies of one State follow the contract beyond the boundaries of such State. *Ib.*
9. The courts of the State of Louisiana can, by constructive notice, bring in a non-resident alien to litigate with a citizen of this State upon any right or interest whatever, existing by virtue of its laws. *Ib.*  
See Appeal, No. 48.  
Constitution, Nos. 6, 7, 8, 9, 10, 11.  
Exemptions, Nos. 3, 4.  
Garnishment, No. 2.

STARE DECISIS. See Appeal, No. 15.

SUCCESSION. See Heirs—

Pleading, Nos. 41, 42.

#### SURETY.

1. A surety upon a lease is not discharged by the mere failure of the lessor to enforce or preserve his privilege. Variol v. Doherty, 118.  
See, also, Bills and Notes, No. 14.
2. Where the treasurer of an association furnishes bond, he and his sureties, members of such an association, are chargeable with knowledge of the character and duties of the office he holds, and the nature of the bond required. Sociedad v. Ducorro, 218.
3. Even though such bond be signed some time after the election of such treasurer, it will cover funds which have come into his hands at any period after he became such treasurer. *Ib.*
4. Where the surety binds himself for the "funds and other appurtenances of the association," the bond covers whatever may come regularly into his hands at the time of signing such bond. *Ib.*
5. To entitle a surety to contribution, as against his co-surety, it must appear that the former has satisfied the debt, in consequence of a lawsuit instituted against him. Succession of Monson, 368.
6. Until this is shown the surety is without cause of action against his co-surety. *Ib.*

#### TAXATION, TAX SALES.

1. The taxing power is legislative, and it is for the legislature to control and regulate. State ex rel. v. Assessors, 25.
2. The act of 1878, page 234, does not repeal act of 1877, page 154. *Ib.*

3. One who purchases property which he alleges to be over-assessed, and which came into his possession after the expiration of the delay allowed by law for opposition to the report of assessors, is bound by the legal consequences of his predecessor's neglect to duly complain.  
*Ib.*
4. The act No. 7, extra session of 1875, prohibiting sales for taxes during a certain period, cannot apply to sales effected before its passage.  
*Schwartz v. Huer, 81.*
5. A tax sale must be advertised three times within ten consecutive days before the sale, or the title is void.  
*Worman v. Miller, 158.*
6. In forced sales for taxes, every formality of the law must be strictly complied with, under pain of nullity.  
*Ib.*
7. Where absolute nullity is apparent upon the face of a tax sale, such sale may be attacked collaterally.  
*Ib.*
8. The failure to pay a State license for a particular business, does not impair the right to sue for compensation of services.  
*Houston v. Boagni, 164.*
9. The only penalty fixed by law for the non-payment of State licenses for 1880, was that the delinquent might be prevented from transacting business.  
*Ib.*
10. A purchaser of real property upon twelve months' bond, with mortgage, is bound to keep down the taxes and to prevent the sale of the property for taxes.  
*Martel v. Smith, 167.*  
*See Estoppel, No. 8.*
11. Where such a purchaser has suffered the property to be sold for taxes, and bought in himself, his title cannot prevent the foreclosure of the bond.  
*Ib.*
12. Where the law indicates a particular method for contesting assessments, and fixes a delay within which this must be done, the courts will not relieve one who has neglected to avail himself of such remedy.  
*Tragar v. Clayton, 223.*
13. In such contests the courts are not limited simply to questions of valuation. They may relieve where there have been double assessments, assessments in wrong names, etc.  
*Ib.*
14. Where, to the deputy assessor, the tax-payer suggested a valuation which was placed in one column, as required by law, and, on final action, the assessor himself, in another column intended for that purpose, sets down the figures which he considers just, the action of the latter is binding.  
*Ib.*
15. The tax-payer was not relieved by the conduct of the deputy from the duty of inspecting the rolls and making objection within the legal delay.  
*Ib.*
16. If the sum fixed upon by the assessor is fair, the court will not reduce, simply because he has reached such just conclusion in an irregular manner.  
*Ib.*
17. For timber cut from land by a trespasser before a tax-sale of the land, the purchaser has no cause of action against such trespasser.  
*Taylor v. Frederick, 380.*
18. The tax-collector would have been without authority to subrogate such a purchaser to the cause of action against such trespasser.  
*Ib.*  
*See Evidence, No. 9.*  
*Jurisdiction, No. 2.*

USAGE.

1. Where the usage of this market, in case of solvent purchasers of sugars, is to allow five days for payment of the price, and nothing is expressed to the contrary, such usage enters into the contract.  
*DeLaune v. Agar & Lelong, 97.*
2. Depositors of banks are not bound by clearing house rules.  
*La. Ice Co. v. Bank, 181.*

USURY. See Bills and Notes, No. 19.

**WRITS.**

1. Meaning of term, "*mesne process*," as found in the old common law. *Clavarie & Noble v. Waggaman*, 35.
2. Its meaning in American legal terminology. *Ib.*
3. The term, as now understood, covers the writ of sequestration. *Ib.*  
See Damages, Nos. 2, 3, 4, 9, 10, 11.  
Mandamus, Execution.  
Officers, Nos. 2, 3, 4, 5, 6, 7.

**WALLS.**

1. A wall, built in accordance with C. C. 675, between properties, at the sole expense of one proprietor, belongs exclusively to such proprietor, until such time as the other contributes. *Faisans v. Lovie*, 113.
2. The advantage flowing to such second proprietor, from so contributing is, that what was before a private wall becomes one in common, and the latter may make use thereof, as permitted by law. *Ib.*
3. Until such wall has been thus rendered one in common, the non-contributing proprietor has no right to make any use thereof, however slight. *Ib.*
4. Where, without pre-payment of his share, the non-contributing proprietor attempts to use the wall, the owner may prevent such use. *Ib.*
5. Or, if the use be not casual or trifling, the owner may waive prepayment, and, considering such use an acceptance, sue the non-contributing proprietor for his share. *Ib.*  
See Landlord and Tenant, No. 1.

**WARRANTS.** See Constitution, Nos. 6, 7, 8, 9, 10, 11.

**WARRANTY.** See Pleading, No. 4-

*Ex. 191*



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